No. 88-1745

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In The

Supreme Court of the United States

October Term, 1988

EDWARD D. COWHIG,

Petitioner,

vs.

JOHN O. MARSH, SECRETARY OF THE ARMY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether invocation of principles of *res judicata* is constitutionally permissible or appropriate where a review of the record establishes conclusively that throughout the course of the proceedings no agency or court has ever considered *on the merits* the decisive and pivotal issues in this case?

2. Whether an individual caught in the legal crossfire of two strong institutions—the United States Army and the Catholic Church—has suffered an abrogation of his constitutional rights when each entity issues contradictory and opposite statements regarding the custody, influence, and impact of a disputed document having critical, decisive and determinative radiations and no process of discovery from either institution—was accorded the petitioner?

3. Whether the Army Board for Correction of Military Records arbitrarily and capriciously has refused to consider new and dramatically relevant and exculpatory evidence to the issue of whether petitioner was an "alcoholic"—the primary, ostensible reason for his discharge from the United States Army?

4. Whether both the United States District Court and the United States Court of Appeals abdicated the meaningful review function over the Army Board for Correction of Military Records by according an uncritical deference to the determination of the ABCMR on such issues as to whether the petitioner's original discharge from the U.S. Army was indeed "voluntary" and whether there was substantial evidence to support the alleged basis for the separation—the supposed "alcoholism" of petitioner.

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OPINIONS BELOW

All relevant orders and opinions have been reproduced in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on 11 October 1988, affirming the District

Court's judgment dated 26 October 1987. A timely petition for rehearing was denied 11 January 1989. The original complaint was filed in the District Court of Massachusetts 24 July 1986 on the grounds of "lack of due process" under Title 10 U.S.C. §§ 3781-3786 and 10 U.S.C. § 1552. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i), 28 U.S.C. § 1651(a), Article 3 of the United States Constitution, Sections 1 and 2.

Jurisdiction is also applicable under the First Amendment ("free exercise of religion clause") and the Fifth Amendment ("due process clause").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All relevant constitutional and statutory provisions have been reproduced in their entirety in the Appendix, *infra*.

STATEMENT OF THE CASE

I, the petitioner in this case, was a Regular Army officer in the Chaplains Branch of the U.S. Army, on hazardous duty at a critical time in Southeast Asia during 1960-61.

I was a Catholic paratrooper chaplain, the *only one* in the entire Pacific area, able and willing. I had high efficiency reports which placed me in the top five percent.

However, I was sent back to the States by air-medical evacuation 6 October 1961 presumably to be treated and then reassigned.

Subsequent to my departure from Okinawa, a letter was supposedly sent by Lt. Gen. Paul W. Caraway on 11 October 1961 to the Army Chief of Chaplains and thence a duplicate to

the Military Ordinariate in New York City. Based on the contents of this purported letter, my Church authorities *demanded* that I resign.

I went up to New York and spoke to the Chancellor of the Military Ordinariate, my licensing authority. He showed me *no documents*, merely saying they had received critical reports about me. I was restricted in my efforts at self-defense because I could not reveal to him the *nature* of the situation in Asia at that time because of my "top secret" information and the classification thereof, on "a need to know basis" (AR 380-5) (Exhibit Vol. 3, Ct. App., pp. 41, 42) and in which dangerous situation the requirements of pastoral practice in our Church are much greater, *i.e.*, in danger of death priests are required to go into high gear. My unit, the 503rd Airborne Battle Group had been alerted *twice* in 1961 to parachute into a foreign country.

The conclusion by the Chancellor at the meeting in New York was, "Ed, I'm the umpire; when I say you are out, you are out!"

No matter what I was supposed to have done, the Military Ordinariate had the *power by law* [C.F.R. 65.4(b)(ii)] to withdraw my ecclesiastical endorsement, a form of license without which I could not serve in the Armed Forces of the United States. This was so understood by government officials (*see* remarks at bottom of page 50 of Exhibit Vol. 3, Ct. App.).

In 1961, I was *personally forbidden* by a government employee even to take notes when I was momentarily (45 seconds approximately) shown the October 1961 letter of Lt. Gen. P.W. Caraway. When I attempted to take notes, the employee angrily shouted, "You can't do that!" I replied in words to the effect, "But this is cockeyed! It's absurd!" To this day I well remember that scene.

With heavy heart, with *no* voluntariness, *no real freedom* to act otherwise, *with only religious obedience* which I had promised at my ordination as a priest, I *reluctantly resigned* and *so stated* on those papers, according to the model form I had been given to follow (Exhibit Vol. 3, Ct. App., p. 130). A gun put to my head, would be a fitting analogy.

Even before the resignation was to take effect, I attempted to see Cardinal Spellman personally. He was out of town visiting the troops as was his custom during the Christmas season, but it was suggested that I see Bishop Furlong, which I did.

Bishop Furlong's opinion in a nutshell was: "To win is to lose." I wrote to Cardinal Spellman again (11 January 1962) to no avail (Exhibit Vol. 3, Ct. App., p. 140). Time was running out. It had been told to me at the Pentagon, and I was so advised *that if the Military Ordinariate changed its mind* about withdrawal of the endorsement (*i.e.*, the licensing), that the Army would likewise change its position (Exhibit Vol. 3, Ct. App., p. 140, par. 5-6). However, time did run out! I was discharged on 23 January 1962, honorably.

In 1964 I approached the late Speaker of the House, John W. McCormack, for help. In response to the late Speaker's inquiries, Major General, GS, Fred C. Weyand, Chief of Legislative Liaison on 6 April 1964 stated: "The *immediate* or *proximate reason* for the action (my separation) was a report from Lt. Gen. Paul W. Caraway, Commanding General, USARYIS/IX Corps and High Commissioner, Ryvkyu Islands, *to Cardinal Spellman* . . .. Chaplain Cowhig was unable to perform his duties . . ." (Exhibit Vol. 3, Ct. App., pp. 48-49).

The point to be noted here is that Gen. Weyand stated this report *was addressed to Cardinal Spellman.* This *misrepresentation* threw me off track for many years because I was continually being

denied access by the officials of the Church (Vol. 3, Ct. App., pp. 120-122).

On *29 March 1964* (Exhibit Vol. 3, Ct. App., p. 58) Cardinal Spellman wrote to me saying in part; "I have reviewed *the case* and I find that it is not possible for you to return to active duty . . ." Of course, *a copy* of the spurious 1961 letter of Lt. Gen. Paul W. Caraway was *in the Cardinal's files*, poisonous as usual.

On *2 April 1968* (there was a war on), the Chancellor of the Military Ordinariate wrote to my local bishop, Cardinal Cushing, saying; "It is with regret that I write that Father Cowhig could not obtain a *security clearance from the F.B.I* . . . ." (Exhibit Vol. 3, Ct. App., p. 62). Writing to the F.B.I. I discovered they had *no* information on me (Exhibit Vol. 3, Ct. App., p. 64).

Learning of the existence of an Army Board, on *June 11, 1973* I wrote to the Adjutant General, Department of the Army (Exhibit Vol. 3, Ct. App., p. 65) seeking a review of the "circumstances surrounding my *forced resignation,*" and that I considered "my resignation *invalid* and *illegal* based on *false allegations*" and ". . .I am able and willing to resume military service in an airborne outfit." Please note this was *June 1973*!!

In August of 1974 a hearing was conducted by the ABCMR (Vol. 3, Ct. App., pp. 17-23). At this 1974 ABCMR hearing *no* 1961 letter of Lt. Gen. Paul W. Caraway was introduced or presented, but only *extracts*, in outline form, sent on 28 September 1962 by Cardinal Spellman's office to Cardinal Cushing and which I *presented* and attempted to overcome, unsuccessfully, at that time.

It was not until some time later in reading the report of that meeting, I realized, under "The Board Concludes", that they concluded that "the applicant submitted his resignation *under*

duress" (p. 22 par. 3 — the Board concludes, *id.*) "and was *in fact released involuntarily since his ecclesiastical endorsement was being withdrawn*" (*Id*). On 15 October 1974, my records were changed to show that I was "involuntarily" released from active duty under the provisions of *Title 10 U.S.C.§ 3785*, on 23 January 1962.

Half a loaf is not adequate! It was not until much later that I realized what had been done by the use of 10 U.S.C. § 3785 or that it pertained to *substandard performance of duty*, or worse still, separation or relief from duty *for moral or professional dereliction*.

This I could not and will not let stand!

In January 1979 I met and talked with Lt. Gen. (Ret.) Paul W. Caraway in Washington, D.C. He *denied* verbally that he had ever written any report on me and stated that he would personally investigate the matter. In July 1979 Gen. Caraway wrote to me saying, "*I am satisfied that I did not prepare a letter* concerning you. Further, insofar as I can discover, *no letter concerning you was prepared* by a member of my staff or by an *employee in my headquarters, with or without my consent*." (Vol. 3, Ct. App., p. 139).

I resorted to the ABCMR in 1977, 26 March 1980, and 10 September 1980 and was rejected because of what the Board determined to be a "failure to submit sufficient relevant evidence" each time.

According to the Federal Rules of Evidence which are not applicable to the ABCMR, I presume; Fed. Rule 401 defines "Relevant Evidence" as meaning evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence. Denial by a supposed author of authorship would be, to reasonable men, more than a tendency.

At both the 1980 meetings of the ABCMR, March and September, there was introduced *by me* a letter from Lt. Gen. Paul W. Caraway *denying* that he had ever written a letter concerning me. However, this was discounted because of a passage of 18 years and because I had previously asserted that I had seen the letter. I saw it for about 45 seconds! What a shell game! It did exist at one time. But it is the *contents* of the letter to which I object.

Again the Government asserted 25 September 1980 that the document was "*now properly* in the files of the Military Ordinariate in New York City . . ." (Exhibit Vol. 3, Ct. App., p. 83).

The first legal action was in the Court of Claims which because of poor legal advice given to me was *procedurally* out of time, and the action was dismissed, *not on the merits* but by assertion of the statute of limitations.

I moved to the Federal District of Massachusetts asking a mandamus for a hearing before ABCMR. This was denied on the grounds of "res judicata." The Court of Appeals for the First Circuit in 1982 affirmed the lower court. A petition for writ of certiorari was denied 18 April 1983, docket no. 82-6395.

However, *surprisingly*, I received a phone call from the ABCMR in the Pentagon on 26 April 1983 stating that I had been granted a formal hearing.

This hearing was conducted before the ABCMR in September 1983. The ABCMR in its proceedings, recommendations, and conclusions voted *3-2 in my favor* and this report was submitted

28 March 1984 but was *overruled* and *denied* the next day by the Assistant Secretary on 29 March 1984. I petitioned for *reconsideration* under A.R. 15-185, par. 22 several times but was refused each time, despite the fact that I had submitted the testimony of six competent, expert medical men, a psychologist, and three lawyers.

On 24 July 1986 I filed a complaint in the Federal District Court of Massachusetts seeking a review of the ABCMR actions. Judge Young of the District Court on 22 October 1987 ruled that the court ". . . had *thoroughly* reviewed the merits . . ." even though he did *not* have before him the transcript of the 1983 hearing or its appendix and could only have considered the "four corners" of the ABCMR report which was *itself flawed.* Apparently the testimony of the six expert medical men, the three lawyers, and the psychologist was ignored, disregarded as it had not been accepted by the ABCMR under reconsideration. *Arbitrarily* it was rejected by the Board, because it was potent for my position. The interests of truth and justice could have been served but were not. I filed my complaint in the Federal District Court of Massachusetts for violation of due process under Title 10 U.S.C. § 3785.

Judge Young *did not allow for reasonable discovery* which could and would have clarified the serious discrepancies in this case. *No consideration was given to the constitutional violations,* as could and should have been in law. The Court of Appeals affirmed the judgment of the District Court in October 1988 and denied the rehearing 11 January 1989.

In *none* of those proceedings was the issue of the *authenticity* or the *proper custody* of the *original 1961 Lt. Gen. Caraway letter addressed by the courts,* or the fraud therein involved, amounting to conspiracy.

REASONS FOR GRANTING THE WRIT

This case, arising in the context of the sensitive area of Church/State relations, presents a question of significant first impression. It is the question of whether an individual caught in the legal crossfire of two strong and powerful institutions—the United States Army and the Catholic Church—has suffered an abrogation of his constitutional rights when each entity issues contradictory and antithetical statements regarding the custody, influence, and impact of a disputed document having critical, decisive, and determinative radiations in the case and *no* process of discovery, from either institution, was accorded the petitioner, leaving him fatally wounded in a juridical "No-Man's Land."

The desirability of receiving an authoritative and unified answer so as to provide guidance in the sensitive and critical area is of compelling significance both to petitioner and to others who, unhappily, might find themselves similarly situated. Uncertainty about the proper reach, result, and radiation of each of the institutions in terms of their appropriate constitutional ambit could have far-reaching consequences on the public policy of the nation if left unsettled.

This case also raised important and troublesome questions concerning the *degree of deference* to be accorded an agency determination in the case of the Army Board for Correction of Military Records—and the corollary scope of judicial review in that process. In this case we believe that both the United States District Court and the United States Court of Appeals effectively abdicated their legitimate and mandated role of judicial review by, in effect, according a blind and uncritical deference to the putative "expertise" of the agency in this area. We further believe that by adopting this approach, and in according the totally unnuanced deference to the determinations of the Board, they have effectively closed the door of the federal courts to judicial

review in any meaningful measure. In short, we submit that these federal courts did not accord petitioner meaningful review of his constitutional claims—the very purpose for which federal courts were ordained by the founding fathers.

If allowed the stand, therefore, the decisions below would wrongly thwart judicial review of the wide range of substantive and procedural issues generated on the record—in the highly sensitive area of Church/State relations. In short, petitioner submits that review by this Honorable Court is essential to untangle the knots in the flawed analysis in the courts below and redirect the development of judicial decisions in this area to the path contemplated by the wide range of compelling judicial precedents. Petitioner respectfully submits that grant of certiorari by this Honorable Court is clearly warranted on this record.

This petition for certiorari seeks review of the October 11, 1988 decision of the United States Court of Appeals for the First Circuit affirming the judgment of the District Court, holding that the instant suit is barred by considerations of *res judicata*, or, in the alternative, that the District Court *correctly* dismissed the suit on its merits. Rehearing was denied 11 January 1989.

In the alternative, in addition to seeking grant of the petition of certiorari, the petitioner requests that this Honorable Court exercise its discretionary powers, under 28 U.S.C. § 1651(a). We believe that this action is warranted in these *exceptional* circumstances where adequate relief has been non-available for many years and so far to date has not or cannot be had in any other form or in any other court.

At the outset, it is important to place the issues by the petitioner in context and to understand that by filing suit, the petitioner did not seek to modify the thrust of former suits brought by him challenging his separation from the service, but rather

to put in question the action of the Department of the Army's decision to deny relief in 1984. If this Honorable Court cannot review such an action because of the putative consideration of *res judicata*, petitioner, in effect, is left with *no remedy* to an arbitrary and capricious decision rendered by a governmental body.

It is the petitioner's fundamental position, a point accorded no deference by the Court of Appeals that the District Court purported to enter judgment on the merits of the case *without ever actually considering or coming to grips with the merits of the suit.* The only items before the District Court were the complaint, the government's motion to dismiss on grounds of *res judicata* and the petitioner's memorandum in opposition to the motion. *No evidence* was received, *nor evidence of record* of prior proceedings provided to the District Court judge prior to his decision. *No discovery was allowed!* In that court, as in most other forums, the petitioner was *never afforded a "full or fair" opportunity to argue* the merits of his cause. The most blatant example of this occurred in petitioner's most recent foray to the ABCMR which summarily rejected without even considering overwhelming medical evidence supporting his petition for reconsideration.

Therefore, the petitioner simply is seeking an *opportunity* to argue these matters before an Article III Court *on the merits* of his grievance, an opportunity which he has been routinely denied despite his persistent efforts to get his constitutional claims before a constitutional court seemingly the essence of Article III jurisdiction.

We submit that certiorari should be granted here to establish once and for all the core principle that *res judicata* should *not* be a controlling principle in the presence and *continuance* of fraud and misrepresentation, a result which has continually permeated these proceedings from the very outset. Further, we submit that

res judicata should not be allowed to be controlling *without needed and essential discovery*. It is obvious that the pivotal document here is the 1961 letter of Lieutenant General Paul W. Caraway. That document was the *proximate cause* of the petitioner's separation from the Army, and *not* any other alleged or purported reason or circumstance now addressed by the government in a palpable effort to obscure the real issues here. And yet the petitioner has *never* been able to gain *access* to that letter from the Government or get a definitive court ruling that the letter was either spurious or non-existent. And so, petitioner submits that another reason that this Honorable Court should grant certiorari is to address the issue of whether the Government can withhold evidence of a letter purportedly in their custody—a fact never conclusively established—and use such putative and emphemeral evidence affirmatively as a "sword" to eviscerate petitioner's due process claims.

Even after *the Army Board of the Correction of Military Records hearing of 1983* and the *decision of 1984,* the Board's Executive Secretary on 19 June 1984, asserted: " . . .the Board is *unable* to ascertain *why* the original letter/document from Lt. Gen. Paul W. Caraway is *not* currently in military files. However, it would appear that the *original* letter/document *is* or *was* in the hands of your Military Ordinariate in New York," (Brief Ct. App., p. 137) an assertion for which there is *absolutely no support* in the record. Further on, in the same letter, he asserts: "Because the letter was *not critical* in its determination, the Board made *no attempt* to determine its authenticity." This statement was made despite the fact that another letter from Lt. Gen. Caraway written in 1979 *denying* authorship *by himself* or *any member of his staff* was *presented by petitioner* as evidence at the 1983 hearing. This apparent mind set has been operative in previous court actions and has *colored* the *entire course* of these proceedings. It has presented petitioner with a legal conundrum straight out of "Alice in Wonderland."

It is now clear that the *contents* of the purported 1961 Caraway letter were *false*! Yet, this instrument, and *no other*, was the *cause* of the petitioner's separation. Access to this spurious document, in violation of 10 U.S.C. § 3785, now §1185, was *denied* to petitioner by officials of *both Church and State—a fundamental violation of due process* consistently throughout the course of these proceedings. As petitioner has consistently pointed out below in the context of this kind of proceeding, the invocation of the doctrine of *res judicata* has a very tenuous and flimsy foundation. Judge Nichols, in his order of 27 February 1981, stated: "We need not address . . . *the merits of the cause of action*." And yet the doctrine of *res judicata,* if it means anything, clearly assumes that at some point in the proceeding *some tribunal* has addressed the merits of a claim. That has never happened here at any point in these extended proceedings. The *fact* that some of the petitioner's claims are constitutional claims and have never been considered *on the merits* by a constitutional court makes the present situation even more paradoxical in terms of the core presuppositions of Article III jurisdiction.

Earlier in the same decision of the Court of Claims, the judge states: "Plaintiff . . . was discharged from the Army Chaplains Corps on 23 January 1962 following his *voluntary* resignation." He now seeks to have that discharge declared null and void and requests that this court *remand* the action to the Army Board for the Correction of Military Records . . . ." Again, we see another fatal flaw in these proceedings: petitioner's separation was not "voluntary." It was clearly "involuntary"—a fact belatedly *declared so* in 1974 and acknowledged by government officials, but again in the evanescent world of "Alice in Wonderland," which has characterized these proceedings, *a fact* which has never had a meaningful impact on the course of these proceedings in terms of gaining petitioner any meaningful relief from the belated acknowledgement that the critical discharge here at issue was *involuntary* and *not* volitional.

Judge Caffrey, in his memorandum of 31 March 1982, in his opening sentence, asserts: "this is a civil action, in the *nature of a mandamus*, in which the plaintiff . . . asks the court to compel an officer or employee of the United States . . . to perform a *duty owed* . . . 28 U.S.C. 1361."

However, again, Judge Caffrey *never considered the merits* of the case, but instead based his decision on the prior order of Judge Nichols which barred petitioner because of a supposed six-year period of limitations, and as we have seen proceeded from a fatally flawed premise that the separation was volitional.

In this regard, it is significant to note that Moore's Federal Practice, in discussing *res judicata* principles, states: ". . . if the judgment in favor of the defendant is *not on the merits,* it is conclusive only to what is *actually* judged." [at 0.409-(6)].

It is our position that *nothing* was *actually resolved*, nothing in terms of petitioner's claim was "actually judged" in the Court of Claims. And yet that is a *central requirement* for the invocation of the doctrine of *res judicata*, which the United States Court of Appeals for the First Circuit placed so much emphasis in its decision adverse to the petitioner's claim.

To further show the "Alice in Wonderland" quality of the proceedings in the Court of Claims' action, 17 October 1980, M. Scott Magers, Major JAGC, Chief, Military Personnel Branch, Litigation Division, certified as a "*true and exact copy of extracts of the Official Military Personnel File (OMPF) of Edward Cowhig.*" This was further certified and signed by Clifford L. Alexander, Jr., Secretary of the Army, and Milton Hamilton, Administrative Assistant, *as worthy of "full faith and credit."* Yet, there was *no* document of Lt. Gen. Paul Caraway therein, the *central piece* of evidence in the entire proceeding. Certifying the extracts as "true and exact" would be as valid as certifying

the validity and completeness of a production of Hamlet which had all the characters present except Hamlet.

The plain fact is that the central and crucial piece of evidence was missing, and yet, in his memorandum of 31 March 1982, p. 2, therein, and Exhibit Vol. 3, p. 4 - Ct. App., Judge Caffrey asserted: "In 1974 . . . the plaintiff petitioned the ABCMR . . . After hearing and after examination of *ALL* the pertinent documents . . . ." In the same memo, "on April 13, 1977 . . . the Board considered the *ENTIRE* administrative record . . ." Also, *id.* at p. 6, "On September 10, 1980, after extensive analysis of *all* the evidence before it . . ." But, contrary to the Caffrey decision and as we have now seen, "all" pertinent documents were *not* present. Accordingly, we submit that it is ludicrous to suggest that "the entire administrative record" had been reviewed where such a vital, sensitive, and significant document was conspicious only by its *absence*.

It is plainly obvious, again, that these assertions are surely not true and were not true when written. The vital missing, evidentary link was still missing and may have been *illegally* suppressed! And, yet, the above-cited statements became central premises of adjudications addressed to the petitioner, which later became the self-generative judicial "building-blocks" to the ultimate invocation of the lethal phrase: *res judicata*. And this is the *unfairness* which has consistently permeated these proceedings and is the reason why certiorari should be granted here if the phrase due process is to retain meaning in our own day!

The Honorable Court has declared: "Claim, arising under a government contract and subject to administrative determination, *first* accrues when administrative determination is *finally complete*, and six-year limitation period runs *from that time*." *Crown Coat Co. v. United States,* 386 U.S. 503, 18 L. Ed. 2d 256, 87 S. Ct. 1177 (1967). Because of the *centrality* of the missing key piece

of evidence in this case the administrative determination was *never "finally complete,"* and accordingly, petitioner's claim was not barred by limitations and should not have been perceived to be so.

Another vexing problem, unique to this case, and another compelling reason why certiorari should be granted is that the petitioner has found himself enmeshed in a kind of Church/State juridical "No Man's Land" where a kind of "Wall of Separation," never intended by the founding fathers, has worked in a perverse way to defeat petitioner's claim for meaningful discovery. On the critical issue of the pivotal 1961 "Caraway letter" each side—Church and State—has sought to wash its hands of the responsibility of producing the critical letter. But we submit that, at the very least, there should be an *implied contract* between the government and the Archdiocese for the Military Services, U.S.A. which would preclude this kind of action. The government establishes the qualifications and conditions of employment and the Archdiocese is the *only* supplier of Catholic priests (32 C.F.R. 65.4(a)(ii); 510; 581.3) and this relationship surely must generate some contractual arrangements which give at least a *modicum of protection* to an individual situated as petitioner finds himself here.

As this Honorable Court is aware, the courts will not interfere in a judgment of a hierarchically-organized religion. ". . . Rulings on ecclesiastical matters could not be reviewed. However, the Court noted that this conclusion was true in the *absence of fraud, collusion or arbitrariness.*" Nowak, Rotunda, Young, *Constitutional Law,* West Pub. Co., *quoting Gonzalez v. Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929) at 16.

Petitioner submits that *fraud, collusion, and arbitrariness* are present in this case.

In petitioner's view, this case goes to the very heart of that

relationship or contract! And it is petitioner's claim that one abused the other and that the abuse goes on, with the ultimate loser being the petitioner. One perpetrated fraud on the other! The perpetrator says "it is not really important!" In effect, what everyone is implying by their action is that it is not terribly important that this shocking fraud took place.

Turning to another point, the Court of Appeals for the First Circuit, in its earlier opinion, in 1982, utilized 25 U.S.C. § 2501, was "doubtful" about the application of 28 U.S.C. § 2401 and ultimately relied on the *Doctrine of Laches,* saying: "The short of it is that . . . either barred by prior judicial decision or was too late." (Exhibit Vol. 3, Ct. App., p. 14).

However, at that time, November 1982, the First Circuit indicated, in the opinion written by Judge Davis, that petitioner had "voluntarily" resigned when, in fact, the ABCMR, in 1974, declared petitioner's separation *involuntary* under Title 10 U.S.C. § 3785. This is obviously important since again, it demonstrates that the Court of Appeals *proceeded on a faulty premise* in invoking laches. It is significant to note that this section (U.S.C. § 3785), later renumbered, 1185 came under Chapter 359—Separation from Regular Army *for failure to meet standards.* Section 3785 dealing with *Rights and Procedures* states: (a) each *officer* under consideration for removal . . . shall be (1) *notified* in writing, (2) *allowed reasonable time* to prepare his defense, (3) *allowed to appear* in person and by counsel . . ., and (4) allowed *FULL ACCESS* to, and *FURNISHED* copies of, records relevant to his case *at all stages of the proceeding.*

None of the above requirements were accorded the petitioner in 1961, or in 1974 before the ABCMR, or indeed in 1983, petitioner was clearly *not* allowed full access to, *nor* furnished copies of, *official records* relevant to petitioner's defense.

Resort to the Freedom of Information Act proved fruitless.

My original petition to this Honorable Court was denied 18 April 1983. However, *ten days after* the denial of certiorari, petitioner was *granted a formal hearing* by the ABCMR.This is most important. *The Board granted the hearing freely* and *voluntarily* and without any action on petitioner's part.

As this Honorable Court well knows, "Military correction boards have *abiding moral sanction* to determine, insofar as is possible, the *true nature* of an alleged injustice and *to take steps* to grant thorough and fitting relief." *Yee v. United States,* 512 F.2d 1383, 1387-88, 206 Ct. Cl. 388, 398 (1975).

"Secretaries of military departments have *duty* as well as power to afford servicemen *proper* relief by correcting military records." *Sanders v. United States.,* 504 F.2d 804 (Ct. Cl 1979).

As a result of this voluntary action, the ABCMR *"de novo"* hearing was held in September 1983 (Exhibit Vol. 5, Ct. App. Transcript of ABCMR Hearing, 411 pages; Exhibit Vol. 4, Ct. App., 77 Exhibits to ABCMR hearing, 197 pages). Petitioner submitted an alleged *copy*, a *duplicate*, of the 1961 letter of Lt. Gen. Paul W. Caraway to the Chief of Chaplains (Exhibit 19, Exhibit Vol. 4), which, through the intervention of the Pope's Representative in the United States, petitioner finally received August 1980, *for the very first time.* Rule 1003, the Federal Rules of Evidence, in regard to the admissibility of duplicates states: "a duplicate is admissible to the same extent as an original *unless* (1) a genuine question is raised as to the authenticity of the original, or (2) *in the circumstances* it would be unfair to admit the duplicate in lieu of the original". Petitioner also presented a letter from the same Lt. Gen. Caraway, dated 11 July 1979 (Appendix J, Exhibits, herein) which states: "I am satisfied that I did *not* prepare a letter concerning you. Further, insofar as I can discover, *no*

letter concerning you was prepared by any member of my staff or by any employee in my headquarters, with or without my consent." And based on an extensive telephone conversation with Gen. Caraway, petitioner learned that he had consulted with six other officers whom he considered knowledgable in formulating the judgment that *neither he nor any member of his staff prepared* the pivotal letter which, again, was the *proximate cause* of petitioner's removal from the service.

The fact that the 1961 Lt. Gen. Caraway letter was the *real, immediate and proximate cause* of petitioner's separation was not given sufficient attention, by the Board. It is obvious that the pressure of *time* was a definite factor and one of the main reasons why petitioner believes the five-man board was unable to give *due and balanced consideration to all* the evidence presented. In retrospect, it is clear that the *demand* from petitioner's Church authorities to resign was *prior* to any diagnosis of medical difficulties. The reality is that the *demand* from petitioner's Church, *based on false information*, is the *one* and only *cause* for petitioner's separation, and that fact has never been fully considered by any tribunal. The actual sequence of events in this matter is as follows: *departure Okinawa 6 October 1961; Caraway letter dated 11 October 1961; resignation demanded 31 October 1961; medical diagnosis, 7 November 1961.*

The centrality of the Caraway letter is further made manifest by the following sequence of events: on 28 Sept 1962 - the Chancellor of the Military Ordinariate (now the Archdiocese for Military Services, USA), J. Marbach wrote to the late Richard Cardinal Cushing, the Archbishop of Boston, asserting; "It is true that the priest thinks the charges were exaggerated, *but we are inclined to believe that a three-star general would not send a letter of complaint unless he was certain of the facts*" (p. 51, par. 3, Ex. Vol. 3, Ct. App.). In the light of the above-cited denial of Lt. Gen. Caraway that he ever wrote such a letter, it is clear

how fallacious perceptions shaped events in this matter from the very beginning, and here, once set in motion, they gained a momentum which was impossible for the petitioner to deflect in any meaningful measure.

In the absence of the 1961 Lt.Gen. Caraway letter, it is clear that *petitioner would not* have been separated or at least would have been given an *opportunity* to defend himself which petitioner could have done well since the contents of that spurious letter were blatantly erroneous, particularly in attacking petitioner's *religious* performance of duty. In short the safeguards of 10 U.S.C. § 3785 were clearly denied to petitioner, and that denial constituted a gross deprivation of due process which has never been effectively addressed by any competent tribunal at *any* time.

The reality is that the petitioner has been *arbitrarily* shut-off by the ABCMR *since the decision of 1984* in trying to remedy these matters. Petitioner's further *request for reconsideration* and in presenting *new evidence* have been stonewalled"—no other phrase will do. The Board has callously replied that petitioner's efforts to gain reconsideration have been "insufficient," "based on emotion," "repetitious." And yet, in one submission petitioner has sent the ABCMR, testimony of *six* doctors, a psychologist, three lawyers all of whom examined the medical and other records, and all of whom found overwhelming evidence that a gross injustice propelled petitioner's discharge from the Army in 1961. All of these submissions, favorable to petitioner, have been spurned out of hand. Further written, corroborative testimony by petitioner's commander and executive officer have also been rejected. A letter of Bishop Dimino, Archdiocese for Military Services, USA, *27 September 1984*, was similarly treated with bureaucratic disdain. Yet, *most significantly* this letter stated: "For clarification purposes, this office would like it to be noted that the Military Ordinariate in 1961 requested Father Cowhig to resign his commission in the Army *principally* because of a *copy* of a

letter, *believed to be authentic*, sent from Lieutenant General Paul W. Caraway *to the Chief of Chaplains* containing adverse comments concerning Father Cowhig." (Brief App., Ct. App., p. 147). In the same, September 1984 letter, Bishop Dimino wrote: ". . . this office would *not* oppose his return to active duty as a chaplain." And yet it is *now clear* that the letter—the reason petitioner had to leave the service—was *not* authentic. There has been a deprivation of constitutional dimensions and yet no constitutional tribunal has effectively addressed that fact *on the merits,* but rather have consistently engaged in juridical "shadow boxing" invoking self-generated consideration of *res judicata.*

Please note that this was *not* a mere request by petitioner's Church authorities on 31 October 1961. It was a *demand and so considered* by the Chief of Chaplains office (Brief App. p. 93). It had the full force of ecclesiastical authorities and could not be ignored by petitioner if he were to remain a Catholic priest.

Paradoxically, the ABCMR now takes the position, *since the decision of 1984,* that the Lt. Gen. Caraway letter is *not critical* and have made *no attempt to authenticate it.* But, as seen above, this letter was, and is, vitally critical at each and ever stage of the Kafka-like drama and effectively killed the petitioner's military career.

In the light of this blatant injustice, not unlike a modern "Dreyfus Case," this Honorable Court should grant certiorari and then should remand for complete investigation of this fraud as this is still a *constitutional issue*, since the petitioner has *never received due process* in the proceedings. Since it is a constitutional issue—never addressed effectively by any Article III tribunal *on the merits*—concepts of laches obviously are not relevant, a position we have consistently maintained throughout the course of the proceedings.

As the Court of Claims so clearly stated in *Werner v. United States,* 642 F.2d 404 (Ct. Cl. 1981): "It is clear that the decision of Army Board of Correction of Military Records denying plaintiff's application for the correction of his military records was *inadequate* in that there was no satisfactory indication that the Board based its decisions on a balanced consideration *of all the evidence* presented and available to it." So too, here, and it is central to this petition for certioriari, there has never been a "balanced consideration of all the evidence."

Relative to the question of the sufficiency of the alcoholism allegation, the so-called "alternative grounds" for the disposition below in the District Court and at the First Circuit level, it is clear from the evidence that petitioner was *not* treated *for anything* resembling alcoholism at Walter Reed Hospital. *Numerous medical experts* have testified without exception that the military diagnosis was *clearly erroneous*. It is also clear from the expert medical testimony of Dr. Roark at the hearing in 1983 that petitioner was *not "treated"*, and that the diagnosis of a resident-trainee of two months duration was *inadequate*. The Appeals Court's conclusion that the evidence of petitioner's physical condition was ample and substantial is *totally at variance* with the evidence of record. The record clearly discloses that petitioner's physical condition was not the cause of petitioner's separation and, at best, was a tangential "make weight."

Any fair reading of the record makes clear that all this persiflage and evidential camouflage about petitioner's drinking is a diversionary maneuver to try to justify, "ex post facto," what was and remains a *gross injustice. All the witnesses* at the hearing and *all the written documentary evidence* submitted attest to this and praise petitioner's performance of duty. The reality is that there is *no hard, substantial, or ample* evidence to support the position of the government in this case. The government's position is totally devoid of the *sine qua non* of substantial credible evidence

which is essential to withstand judicial scrutiny.

A classic example of the "Rush to Judgment" may be seen in the decision made by the Assistant Secretary of the Army on 29 March 1984 was *within 24 hours of the date* the papers were sent to him. It was impossible for him to render a fair, reasonable decision in that time period (over 600 pages of testimony and exhibits). The *blinding alacrity* with which the decision was made, or the mere signing or "rubber stamping" of prepared papers, shows that the decision, on the face, was capricious and arbitrary. This is especially so as *two* typewritten papers were prepared; one to grant relief and the other *to deny* relief.

The Assistant Secretary's action showed *complete disregard* of the central fact in these proceedings that Lt. Gen. Caraway had *denied* writing any letter concerning petitioner. There was a *complete* insensitivity to the fact that the *cause* of petitioner's separation was a *false* letter to plaintiff's religious superiors. A case fabricated out of presuppositions, allegations, assumptions, appearances should not make a *CAUSE* sufficient to invoke *res judicata* considerations if the concept of "justice" is still to have relevance in the land.

The total *disregard of fact* here is manifestly arbitrary and capricious. The total disregard and denial of any substantial evidence is manifestly arbitrary and capricious. There was a suppression, if only by silence, of *clear evidence* of collusion and *precipitate prejudgment* on the part of officials in the Chief of Chaplains' Office and in the then termed Military Ordinariate (now called Archdiocese for Military Services, U.S.A.). Again, this evidence which petitioner only *obtained in 1983* was presented to the Board. These are more facts *uncovered* in late years. They are additional and *qualitatively transformational* to any "factual grouping" or "merger" or "connected facts" or "transaction" which may have existed in the 1981 time period. These late facts,

uncovered to this date in 1989, and those *still subject to discovery* are *not identical* to what was present in 1981 for the quite simple reality that they had not been uncovered then. To assert against petitioner consideration of *res judicata* in this context is, again, Kafka-like in the extreme.

Of course, the *basic belief* and *expression of that belief* that petitioner's separation was null and void go back to the very beginning in 1961. That is the identity of issue! That has never been *honestly judged*—on the merits—by *any* tribunal at *any* time.

Even then, in 1961, petitioner tried to overcome this injustice. Petitioner has striven diligently since 1961 to return to military service and all this time tried to discover or uncover what went on *behind his back*. It is clear that in these twenty-seven years, petitioner has succeeded in discovering many concealed and suppressed actions. Petitioner has attempted to bring them to the light of day and to the attention of competent authorities. In this petition for certiorari, petitioner is *still trying to discover*, or uncover, *the true facts* and obtain justice, and it does not seem in the interests of equity and fair-play that the doors of justice should be shut to him now.

These uncovered or discovered "facts" indicate a continued malevolence, an arrogant malice extremely prejudicial to petitioner and the cause he serves, whether in the Army, the Church, or *as a citizen*. All together, these discoveries of late years indicate a *massive cover-up*.

In resisting petitioner's position below in the Court of Appeals, on page 9 of the Assistant U.S. Attorney's Brief on Appeal, it is stated: "the rationale underlying the doctrine of res judicata 'rests upon consideration of economy of judicial time and public policy favoring the establishment of *certainty* in legal relations.' " (*Sunnen,* 333 U.S. at 597). But petitioner asks here,

as he asked there, how can there be *any certainty* when even now, the government, "*the official custodian*" of petitioner's records asserts that it does *not* have Lt. Gen. Caraway's 1961 letter and *attempts after the 1984 decision, to shunt the responsibility to petitioner's Church authorities.* This is tantamount to the cover-up of a fraud and, at the least, a kind of juridical "shell game!" The principle that a series of "connected events" or "grouping of facts," *based on fraud* vitiates the entire transaction and should preclude invocation of *res judicata* considerations is now so well established that it cannot be disregarded as was done here throughout the course of these proceedings.

Bishop Francis X. Roque, Archdiocese for the Military Services, U.S.A., as recently as last *May, 19, 1988*, said that he could not add to what Bishop Dimino of the same office had already written 28 August 1984. "But, let me add now that *we do not possess the original letter of* Lieutenant General Caraway. This was apparently written to the Chief of Chaplains in military channels. We would not possess such a letter *nor are we the custodian* of military records or documents (Appendix A in Reply). This ongoing "Catch 22" is beyond petitioner's present powers to redress, but certainly *cries out for redress* through the powers of this Honorable Court.

The petitioner is definitely caught in the middle between these two powerful institutions, Church and State. This Honorable Court should sit to redress this *continuing, injustice*. This "fact" alone should demolish any concept of "factual grouping" or "connected transactions" implicit in *res judicata.*

In effect, petitioner has *never* been granted the *opportunity to face his accusers*—a blatant absence of due process, and the constitutional guarantee of confrontation which is really what due process is all about.

This Court should not tolerate such behavior. The behavior of the government is surely fraudulent. This Honorable Court has the means to ascertain the truth, while, at this stage, the petitioner is powerless. Petitioner disputed and *presently disputes* the *finality* of the 1981 action. He did this to the extent of appearing before the First Circuit in *1982* and presenting oral argument personally. Petitioner went to this Honorable Court subsequently, to further dispute the *finality* of District and Court of Appeals' decisions. It was only *after the denial of certiorari* 18 April 1983 that petitioner received a phone call 28 April 1983 from the Pentagon *granting* him a formal hearing and *instructing* him to file a letter of request."

In short, my request now is that someone should review this case *properly*, with balanced consideration of *all* the evidence. To date, this has *not* been done! This is the purpose of the suit at bar and the reason for the present petition for certiorari! This is not a stale claim, nor is it vexatious. This case has indeed ripened! Indeed, it may also be properly viewed under the provisions of the Administrative Procedures Act.

To date all tribunals which have purported to consider the issues have overlooked the violation of the petitioner's rights as *guaranteed* by the Constitution, namely *Articles I and V,* thereof.

There has been *no* dereliction or substandard performance of duty as alleged, especially as petitioner was operating with "Top Secret" information (still classified) on a "need to know basis" in perilous circumstances.

CONCLUSION

I humbly petition this Honorable Court to use its inherent powers in the cause of truth, law, and equity and to grant the present petition for certiorari, or to otherwise act. My reputation, a liberty interest, is at stake.

Respectfully submitted,

EDWARD D. COWHIG
Petitioner, Pro Se
245 Chief Justice Cushing Highway
Greenbush MA 02040-0154
(617) 545-4330

APPENDIX A — DEPARTMENT OF THE ARMY, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS PROCEEDINGS DATED AUGUST 14, 1974

ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS
ROOM 1E-517, THE PENTAGON
WASHINGTON, D.C. 20310 ECG/ew

COWHIG, EDWARD D. Appearing: Appl: Yes

016-14-7279 Counsel: None (PUT)

Ref. File No: 13.0 Hearing Set For: 14 Aug 74

CASE SUMMARY

1. APPLICANT REQUESTS: (TAB A) In effect, that his records be corrected to show that he was involuntarily released from active duty on 23 January 1962.

2. APPLICANT STATES: (TAB A) In effect, that his resignation from the Regular Army was submitted only after erroneous and misleading statements had been submitted by LTG Carraway to his religious superiors. Further, because of his Top Secret Security clearance he was forced to remain silent, also, that he received no separation allowances.

3. RECORDS SHOW: Military

DOB:	28 Mar 1919
Education:	MA Theology
Commissioned USAR:	16 Nov 50
Commissioned RA:	15 Jan 55
Ordered to Active Dy	2 Jan 51
Overall Eff Index:	135 in 1961

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Awards:	ARCOM, Master Parachutist Badge, KSM, NDSM, UNSM
Creditable Svc:	11 years
Discharged:	23 Jan 62, Honorable - voluntary resignation

4. (TAB B) On 22 March 1956, the applicant was given a verbal reprimand by his Regimental Commander for his failure to meet an emergency call for a chaplain due to the applicant's over-indulgence in alcoholic beverages and his being involved in an altercation in a German Gasthaus.

5. (TAB C) On 27 March 1956, the applicant received his annual efficiency report, which rated his performance as satisfactory and mentioned the isolated incident outlined above as detracting from his overall performance of duty.

6. (TAB D) In 1961, the applicant's officer efficiency evaluation showed an annual efficiency index for the past three years of over 140 (out of a possible 150) and an overall efficiency index of over 120 for 1958; 124 for 1959; 127 for 1960; and 135 for 1961. (Note: 135 out of a possible 150 points would have placed him in the top 5 per cent of all Army Captains of that time.)

7. (TAB E) On 7 October 1961, the applicant received his last officer efficiency report, for the period 13 July 1961 through 1 October, 1961, which stated in effect, that the applicant was truly an outstanding chaplain; however, his performance of duty had fallen below acceptable standards because of his abuse of alcohol. The report was submitted because of the applicant's being medically evacuated to the United States from Okinawa for treatment of a nervous condition that prevented him from reporting for duty at the appointed times.

Appendix A

8. (TAB F) On 27 October 1961, the applicant was injured by a civilian who attacked him with a broken pitcher in the Knights of Columbus Club in Washington, D.C. The attack apparently was unprovoked and the applicant was an innocent bystander.

9. (TAB G) On 7 November 1961, the applicant submitted his unqualified resignation to be effective as soon as possible under the provisions of Paragraph 2, Army Regulation (AR) 635-120. The applicant stated in his request that he was reluntantly pursuing the action at the request of his ecclesiastical superiors and indicated that he did desire an appointment as a commissioned officer in the Army Reserve.

10. (TAB H) On 24 November 1961, the Chief of Chaplains recommended that the applicant be separated with an honorable discharge and remarked to the effect that the applicant's ecclesiastical superiors' endorsement would be removed if his resignation was not accepted.

11. (TAB I) On 4 December 1961, the DCSPER approved the applicant's resignation and indicated that the applicant would not be tendered a Reserve commission.

12. (TAB J) On 28 September 1962, the Chancellor of the Military Ordinariate, New York, New York, in a letter addressed only to Your Eminence, outlined details of General Carraway's letter to the Chief of Army Chaplains and information contained in a letter concerning the applicant written by his fellow priest in Okinawa. The letter begins by saying that it was the opinion of the Chancellor that the applicant did not possess what he referred to as constant stability due to his abuse of alcohol. The letter from General Carraway was quoted in part and stated the reasons that the applicant had been relieved were because

Appendix A

of his requiring hospitalization for excessive drinking, failure to respond to rehabilitation efforts by Alcoholics Anonymous, psychiatric help or counseling. Cited specific incident wherein the applicant failed to properly perform his duties or discharge his responsibilities as a commissioned officer charged with looking out for the men's welfare.

The priest's letter from Okinawa mentioned the applicant's drinking that resulted in his being incapacitated for duty, that his activities were a source of scandal in the unit to which he was assigned.

The chancellor indicated that he had written a letter to the applicant asking him to resign. (Note: this letter was provided by the applicant.)

13. DOD Military Pay and Allowances Manual provides for severance pay of one month's basic pay for each year of service, not to exceed one year's basic pay, in the case of a regular commissioned officer in the Army who is relieved from duty because of moral or professional dereliction.

14. AR 635-105 dated 13 Dec 60, titled Personnel Separations (Elimination) in pertinent part provides for the separation of commissioned officers from the Regular Army for moral or professional dereliction. Officers separated under the provisions of this regulation are entitled to severance pay.

s/ Edward C. Gibson
Edward C. Gibson
Examiner

4 June 1974

Appendix A

DEPARTMENT OF THE ARMY
ARMY BOARD FOR CORRECTION
OF MILITARY RECORDS

PROCEEDINGS

IN THE CASE OF
EDWARD D. COWHIG
016-14-7279

14 August 1974

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the hearing and deliberation. The following findings, conclusions and recommendations were adopted by the Board.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board convened at the call of the Chairman on the above date and, following consideration of the case and having made its determination thereof, proceeded to other business.

Present:

Mr. William B. Hanback — Chairman
Mr. William M. Schummers — Member
Mr. Patrick J. Sigleo — Member
Mr. Raymond J. Williams — Executive Secretary
Mr. Edward C. Gibson — Examiner

Applicant did appear before the Board. He was represented by counsel.

Appendix A

The Board considered the following evidence:

Exhibit A - Application for correction of military records.
Exhibit B - Military Personnel Records
Exhibit C - Case Summary
Exhibit D - Transcript of Hearing
Exhibit E -

THE BOARD FINDS:

1. That the application was timely filed or the Board has found it to be in the interest of justice to excuse failure to timely file; that the applicant has exhausted all administrative remedies afforded by existing law or regulations.

2. That it incorporates in these proceedings and adopts by reference thereto so much of the Exhibits above, as pertains to the factual showing of the Department of the Army records which generally reflect:

a. that the applicant requests, in effect that his records be corrected to show he was released involuntarily on 23 January 1962 in lieu of the voluntary release on that date;

b. that the applicant was born on 28 March 1919 and entered on extended active duty as commissioned officer on 2 January 1951; that he had a Masters Degree in Theology; that he had 133 months creditable service and no time lost; that he had no courts-martial or record of nonjudicial punishment; that he was appointed a captain the Regular Army on 15 January 1955, that his highest grade held was captain; that he was awarded the Master Parachutist Badge, Army Commendation Medal and Korean Service Medal; that

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he was separated with an honorable discharge on 22 January 1962 based upon his submission of his voluntary resignation;

c. that on 22 March 1956, the applicant was given a verbal reprimand by his Regimental Commander for his failure to meet an emergency call for a chaplain due to the applicant's over-indulgence in alcoholic beverages and his being involved in an altercation in a German Gasthaus;

d. that in 1961, the applicant's officer efficiency evaluation showed an annual efficiency index for the past three years of over 140 out of a possible 150 points;

e. that on 7 October 1961, the applicant received his last officer efficiency report, for the period 13 July 1961 through 1 October 1961, which stated in effect, that the applicant was truly an outstanding chaplain; however, his performance of duty had fallen below acceptable standards because of his abuse of alcohol. The report was submitted because of the applicant being medically evacuated to the United States from Okinawa for treatment of a nervous condition that prevented him from reporting for duty at the appointed times;

f. that on November 1961, the applicant submitted his unqualified resignation to be effective as soon as possible under the provisions of Paragraph 2, Army Regulation (AR) 635-120. The applicant stated in his request that he was reluctantly pursuing the action at the request of his ecclesiastical superiors and indicated that he did desire an appointment as a commissioned officer in the Army Reserve;

g. that on 24 November 1961, the Chief of Chaplains

recommended that the applicant be separated with an honorable discharge and stated that the applicant's ecclesiastical superiors' endorsement would be removed if his resignation was not accepted;

h. that on 4 December 1961, the Deputy Chief of Staff for Personnel approved the applicant's resignation and indicated that the applicant would not be tendered a Reserve commission; and

i. that on 28 September 1962, the Chancellor of the Military Ordinariate, New York, New York, in a letter addressed only to Your Eminence, outlined details of General Carraway's letter to the Chief of Army Chaplains and information contained in a letter concerning the applicant written by his fellow priest in Okinawa. The letter begins by saying that it was the opinion of the Chancellor that the applicant did not possess what he referred to as constant stability due to his abuse of alcohol. The letter from General Carraway was quoted in part and stated the reasons that the applicant had been relieved were because of his requiring hospitalization for excessive drinking, failure to respond to rehabilitation efforts by Alcoholics Anonymous, psychiatric help or counseling. Cited specific incident wherein the applicant failed to properly perform his duties or discharge his responsibilities as a commissioned officer charged with looking out for the men's welfare.

The priest's letter from Okinawa mentioned the applicant's drinking that resulted in his being incapacitated for duty, that his activities were a source of scandal in the unit to which he was assigned.

Appendix A

The Chancellor indicated that he had written a letter to the applicant asking him to resign.

3. DOD Military Pay and Allowances Manual provides for severance pay of one month's basic pay for each year of service, not to exceed one year's basic pay, in the case of a regular commissioned officer in the Army who is relieved from duty because of moral or professional dereliction.

4. AR 635-105 dated 13 December 1960, titled Personnel Separations (Elimination) in pertinent part provides for the separation of commissioned officers from the Regular Army for moral or professional dereliction. Officers separated under the provisions of this regulation are entitled to severance pay.

THE BOARD CONCLUDES:

1. That the applicant's separation with an honorable discharge was appropriate and in accordance with regulations in effect at that time.

2. That the evidence of record indicates the applicant was an outstanding officer and chaplain who infrequently failed to properly perform his duties due to the abuse of alcohol.

3. That the applicant submitted his resignation under duress and was in fact released involuntary since his ecclesiastical indorsement was being withdrawn; therefore, he could no longer serve on active duty as a chaplain.

4. That the applicant apparently felt there was a stigma attached to his voluntary resignation since he qualified his request with the phrase "reluctantly pursuing that course of action" and

the continuance of that stigma, at least in his mind, is unjust.

5. That it is evident from the evidence of record that the applicant's abuse of alcohol was not compatible with his assigned duties of serving the troops as chaplain.

That in consideration of the foregoing findings and conclusions, the circumstances relative to this case would appear to warrant changing the applicant's records to show that his resignation was involuntary.

THE BOARD RECOMMENDS:

That all Department of the Army records of EDWARD D. COWHIG be corrected to show that he was involuntarily released from active duty under the provisions of Title 10 U.S.C. 3785, on 23 January 1962.

s/ William B. Hanback
William B. Hanback
Chairman

Appendix A

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C.

15 Oct. 1974

AG 201 - COWHIG, EDWARD D.
016-14-7279

MEMORANDUM FOR THE ADJUTANT GENERAL:

Having approved the findings, conclusions and recommendation of the Army Board for Correction of Military Records, and under the provisions of 10 U.S.C. 1552, it is directed:

That all Department of the Army records of EDWARD D. COWHIG be corrected to show that he was *involuntarily released* from active duty under the provisions of Title 10 U.S.C. 3785, on 23 January 1962.

s/ Herman R. Staudt
Herman R. Staudt
Under Secretary of the Army

Appendix A

MEMORANDUM OF CONSIDERATION DATED APRIL 13, 1977

IN THE CASE OF:
Cowhig, Edward D.
016-14-7279

DATE: 13 April 1977
DOCKET NUMBER: AC77-01666
INDEX NUMBER: 110.00

COUNSEL: None

MEMORANDUM OF CONSIDERATION

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the consideration.

Present: Mr. Andrian U. Dubuisson - Chairman
Mr. Dominic R. Ciccotelli - Member
Mr. Joseph P. Murphy - Member

Mr. Raymond J. Williams - Executive Secretary
Mr. Edward C. Gibson - Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. AR 15-185, the regulation governing the operation of the Board, provides that each application and the available military records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application.

The Board may deny an application if it determines that

insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. Following consideration of the case and having made its determination thereof, proceeded to other business.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records
Exhibit B - Military Personnel Records
Exhibit C -

APPLICATION REQUESTS: In effect, that his release from active duty on 23 Jan 62 be declared null and void.

APPLICANT STATES: In effect, that his "forced" release from the Army was not only improper but also illegal, and therefore, should be declared null and void. The appl submitted his evidence of letters from eight officers to include Maj. Gen. Sampson, Retired, to support his contention that he was an outstanding officer/chaplain and that the withdrawal of his recognition by the Military Ordinariate was improper.

MATERIAL EVIDENCE OF RECORD: See paragraph b of attached record of board proceedings held on 14 Aug 74. Further, the details of the appl's voluntary separation at the time of his contention in the findings of that proceedings and, in addition the conclusion and recommendations of the Board to show that the appl was involuntarily released from active duty on that date.

DISCUSSION: Father Cowhig was recognized by the Board during

his formal hearing as being an outstanding airborne chaplain. Further, the Board took cognizance of the fact that during his period of service, he unfortunately abused alcohol to the extent that the command felt it necesary not only to relieve him of his duties in Okinawa but also to return him to Walter Reed Army Hospital for treatment.

The appl's desire to be returned to active duty at this time is admirable, however, consideration not only of reasons for his separation before are a matter of concern; but, in addition his age of 57 and the fact that he has not been associated with the Army in any real capacity for the past 15 yrs are also a matter of concern. Further, it is noted that he had only 133 months of creditable service at the time of his separation.

DETERMINATION: The appl has failed to submit suff relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

s/ Edward C. Gibson
for RAYMOND J. WILLIAMS
Executive Secretary

[Stamped]: ABCMR DECISION
Deny w/o Hearing [initials illegible]

Appendix A

MEMORANDUM OF CONSIDERATION DATED MARCH 26, 1980

IN THE CASE OF:
Cowhig, Edward D.
016-14-7279

DATE: 26 March 1980
DOCKET NUMBER: AC77-01666
INDEX NUMBER: 110.00

COUNSEL:
Robert Larkin
Main St.
Norfolk, MA 02056

MEMORANDUM OF CONSIDERATION

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the consideration.

Present:

Mr. Charles A. Chase - Chairman
Mr. Robert E. Carlson - Member
Mr. Samuel T. Brick, Jr. - Member

Mr. Raymond J. Williams - Executive Secretary
Mr. Edward C. Gibson - Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. AR 15-185, the regulation governing the operation of the Board, provides that each application and the available military records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing,

recommend that the records be corrected without a hearing, or to deny the application.

The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. Following consideration of the case and having made its determination thereof, proceeded to other business.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records
Exhibit B - Military Personnel Records
Exhibit C -

APPLICATION REQUESTS: Reconsideration of the Board's previous denial of his request to show that his release from active duty on 23 Jan 62 was null and void and without force or effect.

APPLICATION STATES: That his discharge should be declared null and void because of a fraudulent forged document submitted by unknown persons resulting in his separation. Further states that this deceit was the cause of his separation and loss of his Regular Army commission; therefore, requests restoration of his commission with appropriate adjustments. In addition, the applicant states a letter was supposedly sent to the Chief of Chaplains, then transmitted to his Ecclesiastical Endorsing Agency, and this letter was referred to in correspondence from the Department of Army to the Speaker of the House, John McCormick, in 1964. In addition, the applicant stated the letter

in question was subsequently removed form his files and now LTG Paul W. Carraway, U.S. Army (Retired who supposedly had sent the letter in question, states that he did not send any such letter nor had any knowledge of any letter being sent from his Headquarters. A copy of LTG Carraway's letter submitted by the applicant is attached. The applicant states LTG Carraway would be willing to testify before the Board and that senior officers whom he previously served under indicated that they also would be willing to appear, and he has others who have declared their willingness to testify.

MATERIAL EVIDENCE OF RECORD: Incorporated in this memorandum and included by this reference are the military and medical records which reflect, in pertinent part:

DOB: 28 March 1919

On 14 August 1974, the applicant's request to have his records corrected to show that he was released involuntarily from the Army on 23 January 1962 in lieu of the voluntary release on that date was the subject of a hearing before the Board, following which the Board recommended approval of his request and the appropriate corrections were subsequently made to his record. A copy of the Board Proceedings to include the transcript of the hearing is available for review by the Board.

On 13 April 1977 the Board denied the applicant's request to show that his release from active duty in January 1962 was null and void and without force or effect. A copy of the Memorandum of Consideration is attached.

On 17 July 1962 the applicant in a letter to LTG Paul W. Carraway made reference to the letter written by LTG Carraway to the Chief

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of Chaplains and indicated in his opinion the information contained in the letter was erroneous, particularly the part about his being relieved from duty and returned to the United States for repeated acts of misconduct. There is no record of any response to this letter by LTG Carraway.

On 6 April 1964 the Department responded to a Congressional inquiry concerning the circumstances surrounding the applicant's separation from active duty. A copy of the letter submitted by the applicant is attached which cites a report from LTG Paul W. Carraway, who at the time was a Commanding General of the Armed Forces on Okinawa.

On 11 July 1979 LTG Paul W. Carraway, U.S. Army (Retired), forwarded a letter to the applicant in which he states in effect that he had not prepared any correspondence concerning the applicant and was satisfied that no letter was prepared by any member of his staff in his Headquarters with or without his consent. A copy of the letter is attached.

On 24 September 1979 the applicant requested reconsideration of his previous requests and indicated he did desire to appear before the Board with his private counsel from Norfolk, MA.

DISCUSSION: In consideration of all the evidence, allegations, and information presented by the applicant in relation to the evidence of all the available records, and statutory and/or regulatory provisions pertaining thereto, it is concluded that:

1. The new material evidence submitted by the applicant in the form of a letter from LTG Carraway must be evaluated by the Board in light of the fact the letter was written 18 years after the original correspondence pertaining to the applicant was

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submitted; and that the applicant acknowledged the fact in July 1962 that a letter was written by LTG Carraway to the Chief of Chaplains in regards to his purported acts of misconduct/ intemperance.

2. If the Board were to accept the applicant's contention that the original correspondence was not submitted by LTG Carraway or by his order that, in itself, would not appear to be a sufficient basis to reverse the Board's previous decision to deny his request to void his separation since the record clearly shows the applicant's abuse of alcohol on occasion resulted in his infrequent failure to properly perform his assigned duties, and resulted in his being hospitalized for treatment — apparently for alcoholism.

3. There is no reasonable explanation as to why anyone would have elected to forge LTG Carraway's signature to a document as contended by the applicant, in order to effect the applicant's release from active duty; and that the applicant's obvious belief that a conspiracy on the part of a person or persons unknown to have him hospitalized for alcohol abuse and to, in his opinion, provide false information to the Chief of Chaplains and to the Military Ordinariate to have his ecclesiastical indorsement withdrawn, is understood and appreciated; that this purported conspiracy cannot be supported by any evidence of record except the letter written by LTG Carrway in July 1979; and that this letter, when considered in the light of all other pertinent evidence, cannot in itself justify a finding or conclusion by the Board that the applicants' records, as previously corrected, reflect anything other than a proper and equitable deccision on the part of the Department.

DETERMINATION: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material

error or injustice to warrant a formal hearing.

s/ Edward C. Gibson
for RAYMOND J. WILLIAMS
Executive Secretary

[Stamped]: ABCMR DECISION
Deny w/o Hearing [initials illegible]

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MEMORANDUM OF CONSIDERATION DATED SEPTEMBER 10, 1980

IN THE CASE OF: Cowhig, Edward D.

016-14-7279

DATE: 10 September 1980
DOCKET NUMBER: AC77-01666E
INDEX NUMBER: 110.00

COUNSEL:

MEMORANDUM OF CONSIDERATION

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the consideration.

Present:

Mr. Joseph P. Murphy - Chairman
Mr. Robert C. Best - Member
Mr. Wendell R. Boardman - Member

Mr. Raymond J. Williams - Executive Secretary
Mr. Edward C. Gibson - Examiner

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. AR 15-185, the regulation governing the operation of the Board, provides that each application and the available military records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application.

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The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice. Following consideration of the case and having made its determination thereof, proceeded to other business.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records
Exhibit B - Military Personnel Records
Exhibit C -

APPLICANT REQUESTS: Reconsideraton of his request, in effect, that the records be corrected to show that his involuntary separation in 1962 is null and void and without force or effect; and that he remained on active duty in a commissioned status, being promoted at appropriate intervals until the completion of 20 or 30 years service in the Regular Army and retired for length of service in the highest grade he could normally have expected to achieve during that period.

APPLICANT STATES: The applicant in letters to his various congressional representatives states, in effect, that false information was transferred from the Army to the Military Ordinariate in his church resulting in his being required to submit an unqualified resignation. Further states that false information was given to the Honorable John McCormick, along with false information being given to his religious superiors, Cardinal Cushman and Cardinal Spellman. In addition stated that false information was possibly used to construct "an understanding"

of a basic document previously quoted (he refers to the letter from LTG Carraway to his religious superiors in 1961) is now missing from the Army's files and that the basis for the construction of his "record" was denied by the author (LTG Carraway). The applicant in summary states his Regular Army commission was unjustly removed and should be restored and, in effect, he should be entitled to retirement benefits for length of service.

MATERIAL EVIDENCE OF RECORD: Incorporated in this memo and included by this reference are the military and medical records which reflect, in pertinent parts:

DOB: 28 March 1919.

On 14 August 1974, a formal hearing was held in the applicant's case based on his request to have the records corrected to show that he was involuntarily released from active duty and involuntarily resigned his Regular Army commission on 23 January 1962 in lieu of the voluntary release on that date. A copy of the Board's proceedings along with the copy of the transcript of the hearing is available for review by the Board. The Board recommended his request be approved and that, in effect, he be paid severance pay.

In 1977, the Board denied the applicant's request to correct his records to show that his release from active duty was null and void, without force or effect. A copy of the memorandum is attached.

In March 1980, the Board again denied the applicant's request to have the records corrected to show that his release from active duty in January 1962 was null and void. A copy of the memorandum, plus a copy of the letter from LTG Carraway, US Army, Retired is attached.

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A summary of the events which took place in 1960 and 1961 appear to be pertinent concerning the applicant's current request and are restated below for the purpose of clarity and to insure understanding by both members of the Board and the applicant in regards to the sequence of events which led to his release from active duty.

The applicant's performance of duty with one exception from the time of his initial appointment as a Chaplain in the United States Army until 1960 was without question outstanding. The incident referred to as derogatory occurred in Germany where the applicant became engaged in a fight with a gasthous proprietor because the applicant refused to leave after being awakened from a "drunken stupor".

The applicant was hospitalized in Okinawa in July 1960, apparently in October 1960 and again in February of 1961 and in September 1961. Copies of the medical summaries prepared at the time are attached which describe in detail, the applicant's treatment for alcoholism to include a statement that on one occasion he failed to go to work for four days because of being incapacitated due to the abuse of alcohol. The medical summary or record of medical treatment in October 1960 is not a matter of record, however, is referred to by his religious superior in Okinawa in a letter to the Military Ordinariate in New York at the time noting that he was treated by an Air Force doctor in order to keep the treatment out of the Army channels.

An efficiency report covering the period 13 July 1961 to 1 October 1961 was prepared because of the applicant's permanent change of station. The report, a copy of which is attached, was prepared because the applicant was being medically evacuated to the United States for further treatment for alcoholism. The report, although

not adverse, indicated the group commander felt the applicant was only an effective officer in his demonstrated performance and estimated potential. He gave him a score of 40 out of a possible 100 on overall demonstrated performance, although he gave him a 9 on estimated potential. In addition, the Board's attention is invited to the fact the indorsing officer rated the applicant as below average on adaptability, dependability, self-discipline, self improvement and stamina. Further it is noted that both the rating and indorsing officer, in effect, indicated that if the applicant was able to abstain from the use of alcohol, that he would be without question a valuable asset to the Chaplain Corps.

On 31 October 1961, the Military Ordinariate in New York City in a personal letter to the applicant advised him that it was with regret that they had to ask for his resignation and that his resignation would make the separation from the service a bit easier. The same church authority in September 1962 in a letter addressed to "Your Eminence" not further identified indicated the applicant did not possess what they might term "constant stability" indicating he would be fine for about five months and then there would be some instance of alcoholism which impaired his priestly functions with a certain amount of scandal in each case. It is noted that the applicant felt charges were exaggerated but the church was inclined to believe that a three star General would not send a letter of complaint unless he was certain of the facts. A letter, a copy of which is attached, goes on to describe portions of the letter that was written to the Chief of the Army Chaplains concerning the applicant. In addition, the letter points out that a fellow priest on Okinawa had written a letter concerning the applicant. In view of the fact that the letter involves various members of the church, those names have been removed in accordance with the privacy act and since the name of the

individual involved is not specifically pertinent to the applicant's request.

On 7 November 1961 the applicant, while in the Walter Reed Army Hospital, and according to his testimony before the Board in 1974, was in a locked ward for two weeks, wrote a letter to his church authorities in New York. The applicant in this letter acknowledged that he may have been imprudent in his use of alcohol but that he had never been drunk and had never caused any scandal and never brought disfavor upon the church nor did he wish to do so.

The applicant on a report of medical history prepared in November 1961 pending his separation from the Army in response to the question "excessive drinking habit" indicated No. He. did check, however, excessive worry and depression.

A summary of pertinent actions taken by the applicant and the Department's response to his request following his separation are outlined below:

In July 1962, the applicant wrote a letter to LTG Carraway in which he stated that he had read General Carraway's letter to the Chief of Chaplains when he arrived in Washington the previous fall. The applicant did indicate, that in his opinion, there were many erroneous statements expressed in that document. A copy of this letter is available for review by the Board.

In April 1964, the Department in a letter to the Honorable John W. McCormick signed by a MG, Chief of Legislative Liaison, indicated that if the applicant had not tendered his resignation, his ecclesiastical indorsement would have been withdrawn by the church. Further, the letter cites the immediate or approximate reason for the (action of the applicant being asked to resign) was

a report from LTG Carraway, the Corps Commander on Okinawa. This letter was addressed to the church officials and described a series of incidents involving the applicant's repeated alcoholic intemperance, a trait described as most unacceptable in any Army officer and certainly not to be of countenanced in a Chaplain. The letter further described the applicant's being hospitalized on three occasions in Okinawa and finally being evacuated to Walter Reed hospital for additional hospitalization at which time he submitted his resignation. The letter also commented concerning the applicant's military career which was outstanding aside from the deficiencies mentioned in regard to his abuse of alcohol. The applicant's claim that the charges made by LTG Carraway were exaggerated was not supported by the additional evidence of record which included the fact that the same charges were made by his immediate Commanding Officer and the officer who indorsed his efficiency report. A copy of this efficiency report mentioned above is attached. In addition, the letter also described the similar lapses in Germany 1956 where the applicant's abuse of alcohol prevented his being available to perform a function which required his presence and that this combined with the situation that developed on Okinawa indicated a pattern of conduct on the part of the applicant which was not in keeping with the high estate Chaplains have and must have in the Armed Forces.

The letter in closing indicated that the Chief of Chaplains had determined on several occasions that the Military Ordinariate would not issue an ecclesiastical indorsement for the applicant to be returned to extended active duty as a Chaplain in the Army.

In October 1966, the applicant was advised by the Military Ordinariate in New York that Cardinal Cushing had indicated permission had been granted for him to return to active duty in the Army. Subsequently in April 1968, a letter addressed to

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Cardinal Cushing signed by the same chancellor in the Military Ordinariate in New York in reference to the applicant, indicated that the applicant would not become a Chaplain since it was his understanding that the applicant could not obtain a security clearance "from the FBI".

In November 1975, the Military Ordinariate in New York in response to the applicant's request indicated that they hesitated to send him a copy of General Carraway's report of 1961 to the Chief of the Chaplians since it was not in his favor and they did not think they should release it without the General's permission. The Board's attention is again invited to the fact that General Carraway in July 1979 in response to the applicant's request indicated that he was satisfied that he did not prepare a letter concerning the applicant and further that insofar as he could discover no letter concerning the applicant was prepared by any member of his staff with or without his consent.

In 1978, the Department, in response to an inquiry from the Speaker of the House of Representatives, the Honorable Thomas P. O'Neil, Jr., advised him that the applicant's Official Military Personnel File (OMPF) did not contain any correspondence from LTG Carraway to the officials of the Department of the Army or to Cardinal Spellman.

In June 1980, Senator Tsongas from Massachusetts, in a letter addressed to the Board on behalf of the applicant indicated that there was one element of the applicant's story that seemed to require examination, determination of authenticity and defense if it was a crucial element in the applicant's separation from the military. He makes reference to the letter from LTG Carraway. The basic questions raised by this Senator was: (1) Does the letter exist now in the military records? If so, it should be available.

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If not, why not? Noting that the letter was referred to in correspondence from the Department of the Army to Speaker, McCormick in 6 April 1964. The Senator does not make reference to the fact the applicant in his correspondence to LTG Carraway after reviewing the letter makes no mention of this correspondence. The second question raised by the Senator was, "Is the letter authentic?" Is it signed by LTG Carraway or his authorized agent? The third question is: Are the basic questions raised by the letter central to the Board's failure to arrive at a unanimous decision in denying the applicant a formal hearing? and, Should not the matter of the Carraway letter be resolved once and for all? The Senator in closing indicated he appreciated the time and effort that has gone into the case but at the same time, appreciated the applicant's persistence since his reputation was at stake. Senator Tsongas and the other interested senator from Massachusetts were provided with copies of the Board's last action in the applicant's case.

On 2 Sep 80, the Department of the Army Surgeon General provided the Board with an opinion. A copy is attached which indicates the applicant's return to active duty any time after his release from active duty was medically inadvisable.

DISCUSSION: In consideration of all the evidence, allegations and information presented by the applicant in relation to the evidence of all the available records, and statutory and/or regulatory provisions pertaining thereto, it is concluded that:

1. The Board is satisfied that a letter was forwarded through channels as a result of the applicant's hospitalization for treatment of alcoholism, plus his failure to properly perform his duties to include on at least one occasion being absent from his place of duty for four consecutive days because of his abuse of alcohol,

which prompted the church officials to advise the applicant to resign; and that the letter in question was official and not an effort on the part of some unknown person or persons to effect the applicant's separation without a good and sufficient reason.

2. The authenticity of the letter in question, can be determined by the church authorities and the applicant has informally advised a member of the staff that he is seeking to have this action taken; that the basis for his request to determine the authenticity of the letter at this time is difficult to understand since he himself reviewed the letter in 1961 apparently while on pass or on leave from the Walter Reed Army Hospital where he had been hospitalized for treatment of alcoholism; that the Board accepts the evidence of record which shows the applicant, although an outstanding Chaplain when not under the influence of alcohol or incapacitated because of his over indulgence in alcoholic beverages, performed his duties in an outstanding manner, however, being treated for physical ailments because of his abuse of alcohol and for alcoholism itself supports a finding previously made by the Board that his separation was involuntary; and that a reasonable doubt about his fitness for return to active duty from a medical standpoint is raised by the fact that he continued to abuse alcohol subsequent to separation and the Veterans Administation records indicated he still abuses alcohol and the most recent treatment for alcoholism was in 1977; and the DASG opinion confirms this conclusion.

3. The applicant's failure to be returned to active duty in 1966-68 timeframe because of "security clearance" problem appears to be an effort on the part of either the Church and/or the Department not to specifically address the problem which was his prior treatment for alcoholism; and that if his ecclesiastical indorsement had been restored and the church had, in effect,

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authorized his return and the Chief of Chaplains had taken favorable action on his request for return to active duty, the Department of the Army Surgeon General would not have found him physically fit for continued active duty because of his hospitalization record; and that this conclusion is supported by the fact that the medical summary prepared at the Walter Reed Army Hospital in 1961 indicated his continued retention on active duty, in effect, was not desirable because he had clearly demonstrated an inability to abstain from the abuse of alcohol and this was reconfirmed by DASG opinion dated 2 Sep 80.

4. The Board's decision on a vote of 2 to 1 not to grant a hearing in the applicant's case in the memorandum prepared in May of 1980 is hereby unanimously reaffirmed since a formal hearing would appear to serve no useful purpose and perhaps only raise false hopes on the part of the applicant that he might obtain some retirement benefits from the Army as a senior field grade officer, with 20 to 30 years service at grade 05 or 06 level, (LTC or COL level); and that the only error in his case was the Department's indication that he was voluntarily released from active duty and the Assistant Secretary of the Army approved the correction of his records in 1974 to show he was involuntarily released from active duty.

5. The applicant's contention that his Regular Army commission was unjustly removed and should be restored is not supported by any evidence of record except in his own statements in which he again, in effect, claims a conspiracy was instigated against him to have him removed from active duty; and that the applicant's last efficiency report which he received on Okinawa would probably have resulted in his being nonselective for promotion to any higher grade in the Regular Army on at least two occasions, therefore, he most likely would have been involuntarily released

from active duty in 1966 at the latest.

DETERMINATION: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice to warrant a formal hearing.

s/ Edward C. Gibson
for RAYMOND J. WILLIAMS
Executive Secretary

[Stamped]: ABCMR DECISION
Deny w/o Hearing [initials illegible]

APPENDIX B — ORDER OF THE UNITED STATES COURT OF CLAIMS DATED FEBRUARY 27, 1981

IN THE UNITED STATES COURT OF CLAIMS

No. 427-80C

EDWARD D. COWHIG,

v.

THE UNITED STATES

Edward D. Cowhig, Pro se

Alexander Younger, with whom was *Acting Assistant Attorney General Thomas S. Martin,* for defendant.

Before NICHOLS, *Judge,* Presiding, BENNETT and SMITH, *Judges.*

ORDER

This action is before the court on defendant's motion to dismiss on the ground that plaintiff's claim is barred by the statute of limitations or in the alternative for summary judgment on the ground that there is no genuine issue as to any material fact. Plaintiff has not responded to this motion.

Plaintiff, Edward D. Cowhig is a Roman Catholic priest. He was discharged from the Army Chaplain Corps on January 22, 1962, following his voluntary resignation. He now seeks to have that discharge declared null and void and requests that this court remand the action to the Army Board for the Correction of Military Records and direct the board to expunge his records.

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Plaintiff also seeks money damages in an unspecified amount.

All claims brought against the United States must be commenced within six years after the right of action first accrues or they are barred. 28 U.S.C. § 2401(a) (1976). A claim for active duty pay accrues upon the discharge of the member from the service . *Kirby v. United States,* 201 Ct.Cl. 527, 531 (1973), *cert. denied,* 417 U.S. 919 (1974). Since this action was not brought until 18½ years after discharge and the right of action accrued, it is barred by the statute of limitations. We need not address other defenses raised by the government or the merits of the cause of action.

IT IS THEREFORE ORDERED, that defendant's motion to dismiss be and the same is granted, plaintiff's petition is dismissed.

BY THE COURT

s/ Philip Nichols, Jr.
PHILIP NICHOLS, JR.
Judge

Filed Feb 27 1981

Appendix B

ORDER OF THE UNITED STATES COURT OF CLAIMS DATED APRIL 3, 1981

IN THE UNITED STATES COURT OF CLAIMS

No. 427-80C

EDWARD D. COWHIG

v.

THE UNITED STATES

Before NICHOLS, *Judge,* Presiding, BENNETT and SMITH, *Judges.*

ORDER

PER CURIAM: This case comes before the court on plaintiff's motion, filed March 6, 1981, pursuant to Rule 151(b), to revoke the order of February 27, 1981, of dismissal and permit hearing on defendant's motion to dismiss and for summary judgment. Upon consideration thereof, together with the response in opposition thereto, without oral argument.

IT IS ORDERED that plaintiff's said motion, filed March 6, 1981, is denied.

Filed Apr 3 1981

APPENDIX C - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED MARCH 31, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 81-1616-C

EDWARD D. COWHIG, JR.,

Plaintiff,

v.

JOHN O. MARSH, SECRETARY OF THE ARMY,

Defendant.

MEMORANDUM

March 31, 1982

CAFFREY, Ch. J.

This is a civil action, in the nature of mandamus, in which the plaintiff, Edward D. Cowhig, asks the Court to compel "an officer or employee of the United States . . . to perform a duty owed . . . ." 28 U.S.C. §1361. Specifically, the plaintiff requests that this Court order the Army Board for the Correction of Military Records (ABCMR) to hold and evidentiary hearing to determine whether or not the plaintiff's discharge from active duty was improper and should be declared null and void. The plaintiff seeks a further order enjoining the ABCMR's consideration of evidence of his hospitalizations in 1960 and 1961 during such hearing. The defendant has moved to dismiss the action on the grounds that the plaintiff's claim is barred by the

doctrine of res judicata, the statute of limitations and the doctrine of laches. After hearing, I rule as follows.

In 1960, the plaintiff was a chaplain in the United States Army stationed in Okinawa. It is undisputed that prior to 1960, the plaintiff had maintained an exemplary service record. During 1960 and 1961, the plaintiff was hospitalized on four separate occasions for treatment of alcoholism. The plaintiff's final officer efficiency report, dated October 7, 1961, stated that he was an outstanding officer whose performance had fallen below acceptable standards due to alcohol abuse. On November 7, 1961 the plaintiff tendered his unqualified resignation from active duty. The resignation was accepted on January 28, 1962 and the plaintiff received an honorable, voluntary discharge.

In 1974, the plaintiff petitioned the ABCMR for a change in his discharge status. The Board held a lengthy hearing at which the plaintiff testified. After hearing and after examination of all the pertinent documents, the ABCMR found that the plaintiff's separation from the Army with an honorable discharge was in accordance with the regulations in effect in 1962. The Board also found, however, that the plaintiff had resigned under duress since his ecclesiastical endorsement had been withdrawn. Consequently, the Board ordered that the plaintiff's records be corrected to show that his honorable discharge was involuntary.

On April 13, 1977 the ABCMR agreed to review an application by the plaintiff that it reconsider the 1974 decision and declare that his release from active duty in 1962 was null and void. The Board considered the entire administration record and denied the plaintiff's request without a hearing, stating that the plaintiff had failed to show "probable material error or injustice." On September 24, 1979, for a third time, the ABCMR

agreed to review the 1962 discharge. The Board reached the same conclusion as it had in 1977 and dismissed the plaintiff's claim without a hearing on March 26, 1980. Thereafter, the ABCMR received several inquiries from members of congress and once again agreed to consider the plaintiff's request for relief. The Board re-examined the administrative record and additional evidence presented by the plaintiff. On September 10, 1980, after extensive analysis of all the evidence before it, the Board once again dismissed the plaintiff's claim without a hearing.

While his last petition was pending before the ABCMR, the plaintiff filed suit against the United States in the Court of Claims. The plaintiff sought to have his discharge declared null and void and to obtain unspecified money damages. On February 27, 1981, the Court of Claims allowed the defendant's motion to dismiss the plaintiff's petition. The Court of Claims ruled that the cause of action had accrued in 1962 when the plaintiff was discharged from active duty and that consequently, the six-year statute of limitations barred the plaintiff's claim.

On June 25, 1981 the plaintiff commenced the present action against the Secretary of Army as the person authorized to order the correction of military records through the ABCMR. *See* 10 U.S.C. §1552(a).

Asserting that the Court of Claims decision involved the issue of whether the ABCMR "abused its discretion" by refusing to declare the plaintiff's discharge null and void, the defendant argues that the instant action presents the identical issue and is, therefore, barred by the doctrine of res judicata. I agree.

A judicially created doctrine, res judicata makes a final, valid judgment binding and conclusive on the parties with respect to

"all matters, fact and law, that were or would have been adjudicated in the proceedings." 1B Moore's Fed. Prac. §0.405(1) (1974) at 624. *See e.g. Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955). A party asserting res judicata must prove that the parties are the same, that the earlier judgment was final, and that the cause of action resolved by a final judgment was the same as that presently asserted. *See e.g. Missouri-Kansas Pipe Line Co. v. United States,* 312 U.S. 502 (1946).

I rule that the defendant has done so here and that the doctrine of res judicata bars the present action. First, the defendant has shown the required identity of parties between the prior action and the present action. The fact that the plaintiff nominally has brought the present action against the Secretary of the Army does not disguise the reality that he still is pursuing a claim against the United States. A suit brought against "an officer of the United States is a suit against the United States itself." *Hawaii v. Gordon,* 373 U.S. 57 (1973). Second, the Court of Claims clearly entered a final judgment when it ruled that the statute of limitations barred the plaintiff's claim. Finally, the plaintiff seeks the same ultimate relief as he sought in the Court of Claims and his contention that he seeks only a hearing before the ABCMR simply exalts form over substance.

Plaintiff seeks a hearing before the ABCMR only in the hope that it will culminate in an order that plaintiff recover back pay previously denied as a result of several earlier administrative and Court of Claims rulings. The real purpose of this present case is to ultimately gain the previously denied back pay. As was stated in *Mathis v. Laird,* 324 F.Supp. 885 (M.D. Fla. 1971):

> Plaintiff had his day in court. He brought this same claim before the Court of Claims which after

> consideration dismissed it on the ground that it was barred by the statute of limitations. Plaintiff cannot now file a new suit in a different court . . . and relitigate his claim.

Id. at 888; *see also Boruski v. United States,* 70 F.R.D. 553 (D. Mass., 1976) (present action an effort to relitigate earlier claim; barred by res judicata).

Therefore, I rule that the doctrine of res judicata bars plaintiff's claim and that the defendant's motion to dismiss should be allowed.

Order accordingly.

s/ Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 81-1616-C

EDWARD D. COWHIG, JR.,
Plaintiff,

v.

JOHN O. MARSH, SECRETARY OF THE ARMY,
Defendant.

ORDER

March 31, 1982

CAFFREY, Ch. J.

In accordance with memorandum filed this date, it is ORDERED:

1. Defendant's motion to dismiss is allowed.

2. Complaint dismissed; judgment for the defendant.

s/ Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 22, 1982

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1352

EDWARD D. COWHIG,

Plaintiff-Appellant,

v.

JOHN O. MARSH,
SECRETARY OF THE ARMY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. Andrew A. Caffrey, *U.S. District Judge*)

Before
Davis*, Campbell and Breyer,
Circuit Judges.

Edward D. Cowhig, pro se.
Gregory Flynn, Assistant United States Attorney, with whom *William F. Weld,* United States Attorney, was on brief, for appellee.

November 22, 1982

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* Of the Federal Circuit sitting by designation.

Appendix D

DAVIS, *Circuit Judge*. Appellant Edward D. Cowhig, Jr. (Father Cowhig), then a Catholic chaplain with the Regular Army, resigned from the Army in January 1982 with an honorable discharge. In 1981, he brought this civil suit in the District Court for Massachusetts to direct the Army Board for the Correction of Military Records (Correction Board) to determine whether his discharge from active duty was improper, and whether he should be reinstated on active duty. Chief Judge Caffrey (on March 31, 1982) dismissed the action on the ground that it was barred by res judicata. This appeal followed.

The procedural history of Father Cowhig's claim shows that, while stationed in Okinawa in 1960-61, he had some difficulties with alcohol, and on November 7, 1961 he tendered his resignation which was accepted on January 28, 1962. His claim has been that this resignation was not voluntary but was induced by mistaken action of ecclesiastical authorities attributable to erroneous and perhaps fraudulent information supplied by the Army personnel. Thereafter he made numerous informal attempts to return to active duty. In July 1973 he asked the Correction Board to correct his records to show that his release from active duty was not voluntary but involuntary. This was done in 1974. The next year (1975) he again applied to the Correction Board, seeking to have his release nullified and that he be returned to active duty. In June 1977 this request was denied. Father Cowhig again (in September 1979) sought relief from the Correction Board which denied it in March 1980 and once more in September 1980. Plaintiff brought suit in the Court of Claims which held (in February 1981) that his claim, having been brought more than eighteen years after his discharge in 1962 was barred by the six-year period of limitations applicable to the Court of Claims (25 U.S.C. § 250) because the time began to run from the date of his 1962 separation. *Cowhig v. United States*, Ct. Cl. No. 427-80C (reconsideration denied,

April 3, 1981). The present district court suit was then filed on June 25, 1981.

We hold that, from whatever viewpoint we can appropriately approach this case, the district court was right in dismissing the action. On one view, the six-year limitations statute on district court suits against the United States (*see* 28 U.S.C. § 2401, the district court analogue of 25 U.S.C. § 2501, *supra*) and the decision of the Court of Claims both apply directly to this case because it is in effect an attempt to obtain the monetary relief of back-pay from the United States—a claim which had already been explicitly determined to be precluded by limitations. The district court below so held.[1]

If, however, we accept Father Cowhig's belated disavowal. of monetary relief (*see* note 1, *supra*) and assume that he seeks no more than the prospective affirmative relief of restoration to active duty, we reach the same result. It may be (we do not decide) that 28 U.S.C. § 2401, which is not in terms restricted to monetary claims[2] likewise bars, in itself, this type of action asking affirmative relief which would inevitably lead to the payment of federal money, if only prospectively.

But even if § 2401 is not directly applicable, this action would

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1. On oral argument before us, appellant disavowed all claim for monetary relief, confining his demand to a Board hearing which would simply lead to reinstatement in the Army. But his complaint and position below were not so limited, and Chief Judge Caffrey expressly and correctly understood his position as including a demand for back pay.

2. Section 2401 reads in pertinent part: "* * * every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrued."

be precluded by the doctrine of laches. At the least, the decision of the Court of Claims shows that plaintiff's basic claim first accrued in 1962 when he was discharged, not when the Correction Board later acted on his requests. Over eighteen years elapsed before he sued in the district court. Pursuit of permissive administrative remedies, whether before the Correction Board or through Congressional intervention, did not necessarily toll the running of either laches or limitations.[3] Here, plaintiff's course of pursuing relief from the other tribunals, before he sued in the district court, does not show that his delay in filing suit below was a diligent or reasonable postponement. He did not even petition the Correction Board until 1973 (eleven years after his discharge), and his successive but fruitless petitions thereafter did nothing to enhance his diligence. Nothing in the Board's determinations warranted him in delaying this suit; the partial relief granted by the first Board ruling was all that he requested and the later decisions were wholly adverse. It appears, rather, that he continued with unsuccessful petitions to the Board, then jumped from that tribunal to another, and then still another, all the while simply seeking a renewed chance to win his case on the merits.

On the other hand, the Government has undoubtedly been prejudiced. Memories of the events of 1960-61 have faded in these 18 plus years, and some personnel may no longer be available. *See Deering v. United States,* 620 F.2d 242, 246, 223 Ct. Cl. 342, 350 (1980). This is especially important in this case in which Father

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3. The Court of Claims adhered to this proposition, and has likewise held that military personnel claiming an unlawful discharge may (though they need not) go to the Correction Board but can also sue directly in that court. *See, e.g., Eurell v. United States,* 566 F.2d 1146, 215 Ct. Cl. 273 (1977); *Neumann v. United States,* 219 Ct. Cl. 591, 592-93 (1979).

Appendix D

Cowhig places much of his reliance on a challenge to the authenticity of a letter from a high-ranking Army officer shortly prior to plaintiff's discharge, and also asserts that the statements in that letter were factually false.

Even were we to view Father Cowhig's claim in the most favorable legal light we can imagine—namely as seeking simple court review of a recent agency decision not to reopen—these facts are sufficient to show that the decision was reasonable and hence lawful.

The short of it is that, on any view we can properly take, appellant's suit in the district court was either barred by a prior judicial decision or was too late.

Affirmed

Appendix D

UNITED STATES COURT OF AFPEALS
FOR THE FIRST CIRCUIT

No. 82-1352

EDWARD D. COWHIG,

Plaintiff, Appellant,

v.

JOHN O. MARSH, SECRETARY OF THE ARMY,

Defendant, Appellee.

JUDGMENT

Entered: November 22, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

[illegible]
Clerk.

[cc: Messrs: Cowhig and Flynn]

Appendix D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED DECEMBER 17, 1982

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1352

EDWARD D. COWHIG,

Plaintiff, Appellant,

v.

JOHN O. MARSH, SECRETARY OF THE ARMY,

Defendant, Appellee.

Before Coffin, *Chief Judge,* *Judge Davis and Campbell, Bownes and Breyer, *Circuit Judges.*

ORDER OF COURT

Entered: December 17, 1982

Upon consideration of appellant's "Petition for Rehearing and Rehearing En Banc",

It is ordered that said petition be; and the same hereby is, denied.

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* Of the Federal Circuit, sitting by designation.

Appendix D

By the Court:

s/ Dana H. Gallup
Clerk

[cc: West Publishing Co., Messrs. Cowhig, Flynn and Weld]

APPENDIX E — ORDER OF THE SUPREME COURT OF THE UNITED STATES DATED APRIL 18, 1983

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 18, 1983

Mr. Edward D. Cowhig Rev.
606 East Fourth Street
South Boston, MA 02127

Re: Edward D. Cowhig,
v. John O. Marsh, Secretary of the Army
No. 82-6395

Dear Mr. Cowhig Rev.:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Alexander L. Stevas, Clerk

APPENDIX E-1 — PROCEEDINGS OF ARMY BOARD FOR CORRECTION OF MILITARY RECORDS DATED SEPTEMBER 21, 26, 1983

(Omitted here but printed at pages 71a-78a-iv.)

MEMORANDUM OF ARMY BOARD FOR CORRECTION OF MILITARY RECORDS DATED MARCH 28, 1984

(Omitted here but printed at page 82a.)

MEMORANDUM OF ASSISTANT SECRETARY OF THE ARMY DATED MARCH 29, 1984

(Omitted here but printed at pages 79a-80a.)

APPENDIX F — DEFENDANT'S MOTION FOR DISMISSAL WITH HANDWRITTEN ORDER DATED OCTOBER 22, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 86-2192-Y

EDWARD D. COWHIG,

Plaintiff,

v.

JOHN O. MARSH, Secretary to the Army,

Defendant.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendant John O. Marsh, as Secretary of the United States Army ("defendant"), moves pursuant to Fed. R. Civ. P. 12(b)(6), that the Court dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted or, in the alternative, that summary judgment enter in defendant's favor. As grounds therefor, defendant states that plaintiff's claim is barred by the doctrine of res judicata. Moreover, even if plaintiff's claim is not so barred, it results from a decision of the defendant which is a nonreviewable military personnel decision.

* * *

Appendix F

Young, D.J.: 10/8/86	The within motion is set for hearing on Nov 12, 1986 at 2:00 PM, by the Court, K. Hart, deputy clerk

* * *

October 22, 1987: Settlement in this case having proved impossible, the court has thoroughly reviewed the merits and rules as follows: (1) This action is barred by the principles of res judicata. While the present appeal stems from an agency hearing subsequent to the last appeal to this court, the issue is precisely the same as that earlier presented. (2) In the alternative, the court rules that the Department of the Army decisions herein were not arbitrary or capricious. Accordingly, this action must be dismissed and judgment must enter for the defendant.

s/ William G. Young
District Judge

Appendix F

JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS DATED OCTOBER 26, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 86-2192-Y

EDWARD D. COWHIG,

Plaintiff,

v.

JOHN O. MARSH, Secretary of the Army,

Defendant.

JUDGMENT

YOUNG, D.J. October 26, 1987

In accordance with the Court's order of October 22, 1987, it is hereby ORDERED:

Judgment be and hereby is entered for the Defendant.

s/ William G. Young
WILLIAM G. YOUNG
UNITED STATES DISTRICT
JUDGE

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT CONSOLIDATING APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1012

EDWARD D. COWHIG,
Plaintiff, Appellant,

v.

SECRETARY OF THE ARMY,
Defendant, Appellee.

ORDER OF COURT

ENTERED: January 12, 1988

Upon consideration of appellant's two motions to consolidate the three appeals filed in district court case number 86-2192,

It is ordered that the motion of appeals of October 29, 1987, December 7, 1987 and January 7, 1988 be consolidated and that they be treated as one appeal in this court.

By the Court:

s/ Francis P. Sigliano
Clerk

APPENDIX H — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 11, 1988

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1012

EDWARD D. COWHIG,

Plaintiff, Appellant,

v.

SECRETARY OF THE ARMY,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, *U.S. District Judge*]
Before

Campbell, *Chief Judge*,
Coffin and Selya, *Circuit Judges*.

Edward D. Cowhig on brief pro se.
Peter E. Gelhaar, Assistant United States Attorney, and *Frank L. McNamara, Jr.*, United States Attorney, on brief for appellee.

OCTOBER 11, 1988

Appendix H

Per Curiam. Plaintiff-appellant Edward Cowhig, who served on active duty in the Army as a chaplain, resigned from the Army in January 1962 with an honorable discharge. In the instant action he seeks an order that the Army void his discharge and restore him to active service. He has already unsuccessfully sought this same relief on numerous occasions, from the Army Board for the Correction of Military Records ("ABCMR"), from the Court of Claims, and from the District of Massachusetts. This court's opinion affirming the district court's denial of relief in appellant's prior district court suit provides a more detailed account of appellant's previous litigation regarding this matter. *Cowhig v. Marsh,* 693 F.d 234 (1st Cir. 1982), *cert. denied,* 460 U.S. 1092 (1983). After that lawsuit was concluded, appellant again sought the same relief — that the Army void his discharge and restore him to active duty — from the ABCMR. After a hearing, the ABCMR by a 3-2 vote issued a decision recommending that appellant be restored to active duty until his completion of twenty years' active service for retirement purposes. On March 29, 1984, however, the Deputy Assistant Secretary of the Army rejected this recommendation, adopted the minority position, and denied relief.

Over two years later, appellant filed the instant suit in the district court to overturn the Department of the Army's ruling and obtain restoration to active duty. The district court granted the motion of defendant-appellee John Marsh, Secretary of the Army, to dismiss appellant's claims. The court stated as follows: "1) This action is barred by the principles of res judicata. While the present appeal stems from an agency hearing subsequent to the last appeal to this court, the issue is precisely the same as that earlier presented. 2) In the alternative, the Court rules that the Department of the Army decisions herein were not arbitrary

or capricious." We affirm the judgment of the district court for these same reasons.

It is settled law that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Pasterczyk v. Fair,* 819 F.2d 12, 13 (1st Cir. 1987) (quoting *Allen v. McCurry,* 449 U.S. 90, 94 (1980)). We agree with the district court that appellant's action is barred under principles of claim preclusion by the final judgment in appellant's previous district court action against the same defendant, *Cowhig, supra,* 693 F.2d 234.

Appellant's only colorable argument against claim preclusion is that his present suit states a different cause of action than did his prior suit. The basis for this claim is that the present suit seeks to overturn the Department of the Army's 1984 ruling, which had not yet been handed down at the time of the first suit. However, this court has embraced the principles of § 24 of the Restatement (Second) of Judgments (1982) establishing a "transactional" definition of the underlying claim or cause of action. *Manego v. Orleans Board of Trade,* 773 F.2d 1, 5 (1st Cir. 1985), *cert. denied,* 475 U.S. 1084 (1986). Section 24 provides that "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."

There is no doubt in this case that appellant's claim arises out of the same "transaction" or "factual grouping" as did his claim in his previous suit. In both cases appellant has asserted that his 1962 discharge was improper because induced by erroneous or fraudulent information supplied by Army personnel, and that accordingly he is entitled to reinstatement. The fact that the

Department of the Army heard and rejected appellant's allegations again in 1984, and that appellant now challenges that new 1984 finding, does not give rise to a new "claim" for claim preclusion purposes. The 1984 Department of the Army proceedings dealt with the same allegations, arising out of the same transactions, that appellant raised in his prior district court suit. Appellant is merely changing his theory of recovery, i.e., presenting his action as one seeking to overturn the 1984 ruling. It is well-settled that a second suit based on the same transactions is barred by principles of claim preclusion even though the plaintiff may have adopted a new theory of recovery. *Pasterczyk v. Fair,* 819 F.2d 12, 14 (1st Cir. 1987); *Manego v. Orleans Board of Trade,* 773 F.2d 1, 6-7 (1st Cir. 1985), *cert. denied,* 475 U.S. 1084; *Capraro v. Tilcon Gammino, Inc.,* 751 F.2d 56 (1st Cir. 1985). Accordingly, the instant suit is barred by *res judicata.*

We also agree with the district court's alternative ground for dismissal. We must uphold the Department of the Army's 1984 decision unless it is arbitrary, capricious, unsupported by substantial evidence, or legally erroneous. *Hodges v. Callaway,* 499 F.2d 417, 423 (5th Cir. 1974). Appellant has demonstrated no basis for overturning the Department of the Army's decision to deny relief. It is clear from the governing statute that the Secretary of the Army was charged with the final decision on appellant's claim and was free to disregard the ABCMR's recommendation. 10 U.S.C. § 1552(a); *Miller v. Lehman,* 801 F.2d 492, 497 (D.C. Cir. 1986). Further, our review of the record reveals that it contains ample evidence to support the Secretary's decision that appellant was discharged due to alcoholism and that appellant had continued to abuse alcohol after his discharge, rendering his restoration to active duty inappropriate. Therefore, even if principles of claim preclusion did not bar appellant's action and we were to review the Department's 1984 decision, we would

affirm it as supported by substantial evidence.

The judgment of the district court is *affirmed*.

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 88-1012

EDWARD D. COWHIG,

Plaintiff, Appellant,

v.

SECRETARY OF THE ARMY,

Defendant, Appellee.

JUDGMENT

Entered: October 11, 1988

This cause was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

s/ Francis P. Scigliano
Clerk

[cc: Messrs. Cowhig and Gelhaar]

APPENDIX I — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 11, 1989

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1012

EDWARD D. COWHIG,

Plaintiff, Appellant,

v.

SECRETARY OF THE ARMY,

Defendant, Appellee.

Before

Campbell, *Chief Judge*,
Coffin, Bownes, Breyer, Torruella and Selya, *Circuit Judges*.

ORDER OF COURT

Entered January 11, 1989

Appellant's petition for rehearing and suggestion for rehearing en banc is denied.

By the Court:

Francis P. Scigliano
Clerk.

[cc: Messrs Cowhig and Gelhaar]

APPENDIX J — EXHIBITS

Edward D. Cowhig
016-14-7279
Greenbush, MA 02040-0154
February 14, 1986

RE: Docket-AC77-01666E
Index No. -111.0

Army Board for Correction
of Military Records
Room 1-E-517
The Pentagon
Washington, D.C. 20310-1803

Dear Sirs:

I am applying for consideration "de novo" *based on new evidence not previously considered* in accord with the applicable regulation AR 15-185 or whatever regulation applies to my claim and case.

I have constantly and consistently asserted that my separation from the U.S. Army was *improper and unjust, illegal and fraudulent, consequently null and void.* Not only was my severance unjust but was in contrast and *in violation of existing Army regulations* for a Regular Army officer in addition to a *violation of my Constitutional rights.* I was *denied due process of law* and was the subject of prejudice, discrimination, hasty and arbitrary judgements based on *libel and slander* which have seriously affected my career and profession. I demand to be made whole. I seek the restitution of my Regular Army Commission with all appropriate adjustments in rank and privileges. I demand to be restored, "Nunc pro Tunc", "Now for Then."

Appendix J

I have suffered a great deal from this nefarious action which was based on poisonous lies an concoctions of disturbed personalities. I know it is very difficult to prove the latter but that is my conviction.

I am enclosing documents lately obtained from five medical doctors which to me indicate medical malpractice. I am enclosing documents from three lawyers who have analyzed my testimony of 1974 and 1983, asserting that there is no conflict or contradiction in my testimony, as was alleged in the minority report of 1984.

I am also including a document from Dr. Hurwitz, a psychologist at Boston College, who clearly indicates the injustice which has been perpetrated.

I ask you to especially note the memo of Mr. Gibson of the ABCMR dated 11 April 1980, which incidentally was *not* presented to the Board. The notes he mentions, as obtained from the Chief of Chaplains' office, indicate the *prejudgement* of that office even before I left Okinawa. I call your attention to the line *above and before* the information - "evacuated by air 6 Oct. 1961, etc . . . ." (To be RAD) - (TWX CGUSARYIS.)" They had already made up their minds!

Unfortunately the TWX from the Pentagon to the Commanding General of USARYIS cannot *now* be found by the Access and Release branch of the Adjutant General, even after several searches and even, when I gave them the reference number of the original message. DA-MSG-23416.

I had hoped to obtain this message from DA to further evidence the arbitrary, impetuous maneuvers of the Chief's office and its counterpart in New York. Unfortunately also, I cannot evidence

the telephone calls from Okinawa to Washington to New York which played their part in disseminating the poison.

I call your attention also to the memorandum from the office of the Military Ordinariate in New York dated 21 Sept. 1961, in which the Chancellor in that office is asking the Deputy Chief of Chaplains -- "if he wanted me to withdraw the endorsement."

I again call your attention to the fact that the above mentioned Chancellor demanded my resignation *after* the receipt of Lt. Gen. Caraway's spurious letter, and *before* any medical diagnosis, no matter how flawed the latter was.

I claim that the action of the ABCMR of 1984, and the decision by Mr. Wm. D. Clark of 29 March 1984 to be arbitrary, in disregard of the facts, and furthermore injurious to me, particularly in that I was alleged to have made, *under oath,* contradictory and conflicting statements. This attacks my honor and reputation, so I cannot and will not let it stand.

The action by the Board in 1974, in citing #3785 of Title 10 U.S.C. is another example of injury. This note is still on my discharge papers, and though most people would not know what it signifies, nor did I for many years, I cannot let that stand. It is manifestly clear from the oral testimonies of my C.O. and exec. officer as well as the written testimony of all of the 503rd Airborne staff that my performance of duty was of the highest standard.

I have previously sent you letters indicating that the spurious letter of Lt. Gen. Caraway, 11 Oct. 1961, was *not properly prepared* by the Staff, as in the opinion of the Exec. Sec. of ABCMR. (Note Col. John Finn, the reviewing officer of my last efficiency

report checking the box—item 19—"my review indicates *no* further action."

Again, I call your attention to Bishop Dimino's letter 28 Aug. 1984 asserting that they in 1961 received a COPY of the Caraway letter, and *not* as the Exec. Sec. of ABCMR opines that they were the original recipients and therefore the legal custodians of that document. It was addressed to the *Chief of Chaplains* and for years and years I have been *denied* access to it.

Enclosed are the documents above mentioned.

Sincerely,

s/ Edward D. Cowhig
Edward D. Cowhig

P.S. I am still able and willing to serve. EDC

Appendix J

Edward Cowhig
Greenbush, MA 02040
April 1, 1986

Army Board for the Correction
of Military Records
The Pentagon
Room 1E-517
Washington, D.C.

Dear Sirs:

I have previously sent to you documents, as new evidence, not previously considered under paragraph 22 of the AR 15-185. These documents were received 18 February 1986 by the Defense Registered, Pentagon Bldg., as article number P276984914.

To my great surprise and astonishment on the *15 March 1986* I received back the same documents. There was *no* covering letter then or since. There has been *no explanation*! This package which was thus returned came from the Army Board for the Correction of Military Records, Room 1E-517, The Pentagon.

What is going on there? I think I deserve a responsible answer.

Sincerely,

s/ Edward D. Cowhig
Rev. Edward D. Cowhig

Appendix J

Edward Cowhig
Greenbush, MA 02040
016-14-7279
RA 075056
April 29, 1986

Army Board for Correction
of Military Records
Room 1-E, 517
The Pentagon
Washington, D.C. 20310-1803

RE: Docket No. #AC77-01666G
Index No. #111.01,-134-01

Dear Sirs:

For the *third* time I am asking for *reconsideration* of my case before your Board.

I do this pursuant to AR 15-185, paragraph 22, which states, and I quote: 22 *Reconsideration.* — "After final adjudication, further consideration will be granted only upon presentation by the applicant of newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Army."

I have sent to you new evidence by certified mail which was received at the Pentagon on 18 February 1986 but was returned to me on 15 March 1986 without any covering letter or explanation.

I sent another letter which was received at the Pentagon 3 April 1986 and was returned to me again without explanation or covering

letter. Even the envelope, opened, was sent back to me.

I believe the board is derelict in its duty to me and *is practically in contempt of Congress by its evasiveness* and merely asserting that I have a right to judicial review in a competent court. That I already know, but the new evidence should at least be looked at and filed.

This is a case that has perdured for almost twenty-five years and has caused me tremendous trouble. It is a delicate case because it impinges upon the relationship of Church and State in the management of the Defense Department in personnel affairs.

This is a case where false, libellous, slanderous statements were made, or believed to have been made, by a three-star general to the highest authorities of my Church.

The poison from this alleged source has contaminated my whole life and seriously affected all relationships and destroyed my regular Army career.

The document leaking this poison is now missing from my official file and I am barred from obtaining this document even under the Freedom of Information Act. In 1980, I finally gained access to a *copy* of this poisonous document for recourse to the Apostolic Delegate, the papal representative, Archbishop Jodot.

I have not charged lible, slander, fraud, medical malpractice, prejudice and discrimination previously, but they are all involved.

I have not been unwilling to risk my life for my country and am *still willing to do so,* but I cannot allow this neglect and evasiveness, this "stone-walling", to deter the correction of a gross, patent

injustice. Injustice, sadly, is a reality in this world but it is the *duty* Congress has given to the Board for Correction of Military Records to redress such situations in accord with the applicable regulations.

As you are aware by now, I have sent some copies of the new evidence to several Congressmen and am awaiting their reply.

Your previous response to Senator Kerry was inadequate and evasive. Your enclosures of letters of 1984 *are not* as you claim self-explanatory. Even in those letters you admit the possibility of a *basis for reconsideration*.

I think I deserve an honest, reasonable and responsible answer.

My good name, reputation and integrity are at stake, so I will persevere.

Sincerely,

s/ Edward D. Cowhig
Rev. Edward D. Cowhig

P.S. As you may, or may not be aware, I have until 29 March 1990 to contest the arbitrary and contrary to the facts' decision of the Principal Deputy Assistant Secretary of the Army, William D. Clark, in a Federal Court. (Proper U.S. — 154 F. Supp. 317)

All these years I have been trying to avoid undue publicity as I do not consider it constructive.

P.P.S. The new evidence consists of statements from my commander and executive officer on Okinawa, five doctors

Appendix J

(including the Veterans Administration), three lawyers and a psychologist from Boston College.

As a minimum you should read and comment, one way or another.
EDC

Appendix J

PROCEEDINGS

IN THE CASE OF:
COWHIG, EDWARD D.
016-14-7279

DATE: 21 & 26 September 1983
DOCKET NUMBER: AC77-01666G
INDEX NUMBER: 111.01, 134.01

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual. A quorum was present during the hearing and deliberation. The following findings, conclusions and recommendations were adopted by the Board.

Applicant requests correction of military records as stated in application to the Board and restated herein.

The Board convened at the call of the Chairman on the above date and, following consideration of the case and having made its determination thereof, proceeded to other business.

Present:

Mr. Joseph P. Murphy — Chairman
Mr. Adrian U. Dubuisson — Member
Mr. William D. Masters, Jr. — Member
Mr. Philip E. Lavigne — Member
Mr. Jack E. Hobbs — Member

Mr. George Sowa — Executive Secretary (Acting)
Mr. Loren G. Harrell — Examiner

Appendix J

Applicant (did) appear before the Board. He (was) represented by counsel.

The Board considered the following evidence:

Exhibit A - Application for correction of military records.
Exhibit B - Military Personnel Records
Exhibit C - Case Summary
Exhibit D - Transcript of Hearing with applicant's exhibits
Exhibit E -

THE BOARD FINDS:

1. That the application was timely filed or the Board has found it to be in the interest of justice to excuse failure to timely file; that the applicant has exhausted all administrative remedies afforded by existing law or regulations.

2. That it incorporates in these proceedings and adopts by reference thereto so much of the Exhibits above, as pertains to the factual showing of the Department of the Army records which generally reflect:

a. that the applicant requests, as amended by counsel during course of the hearing, his records be corrected by:

(1) voiding of his discharge from the United States Army on 23 January 1962;

(2) correction of his records, and any other system(s) of departmental records, to show his retroactive restoration to active duty in a commissioned status, effective 23 January 1962;

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(3) correction of his records, and any other system(s) of departmental records, to show that he has served continuously on active duty in a commissioned status since 23 January 1962 or, in the alternative, that he served on active duty in a commissioned status from 23 January 1962 until 2 January 1971, or such other date as may be deemed necessary and/or appropriate, at which time applicant was retired by reason of years of service under the provisions of 10 U.S.C. Section 3911;

(4) voiding and expunging from his records, and any and all other system(s) of departmental records, of any and all documentation/information relating to the resignation submitted by him on 7 November 1961;

(5) voiding and expunging from his records an officer efficiency report for the period 13 July to 1 October 1961; and

(6) such other and/or further relief as may be deemed necessary and/or appropriate in order to accord him full and complete relief;

b. that the applicant states that he was requesting reconsideration of his petition to this Board in the interests of justice and equity; that as he claimed in 1973, he was again claiming that his resignation from the Regular Army in 1961 was forced and hence invalid, null and void and should be so declared; that his reputation had been damaged and his character defamed by false reports; that to what extent that could be redressed and repaired, he was uncertain; that he was asking only what was feasible; that his own personal opinion was that it could be somewhat restored, if he were permitted to reenter active service, even at his present

age that he feels that he was ready and willing to resume duty even with the paratroopers; and that he was aware of administrative obstacles to that desire, but the about 240 priest shortage of Catholic Chaplains in the Army could alleviate that difficulty;

c. that the applicant, who was born on 28 March 1919, was appointed as a first lieutenant, United States Army Reserve, on 16 November 1950 and ordered to active duty on 2 January 1951; that he was promoted to the grade of captain, Army of the United States, on 25 June 1954; that he was appointed as a captain, Regular Army, effective 2 January 1955; that he had an overall Efficiency Index of 135 as of 1961; that he had been awarded the Army Commedation Medal, the master Parachutist Badge, the Korean Service Medal, the National Defense Service Medal, and the United Nations Service Medal; that he had served overseas in Korea, to the grade of major by the 1961 promotion selection board; and that on 23 January 1962, he was honorably discharged, based on his voluntary resignation, in the grade of captain, with over 11 years creditable service;

d. that, upon the applicant's medical evacuation fro .1 Okinawa, an officer efficiency report was rendered covering the period 13 July to 1 October 1961, wherein he received an overall numerical rating of 144.8 out of a possible 240; that the rater stated, in fact, under remarks that the applicant had recently suffered from a nervous condition which prevented him from reporting for duty at the appointed time; that the indorser stated, in fact, that the applicant's performance of duty as a chaplain would be outstanding except for the fact that at various times he had required

treatment caused by hypertension and nervousness involving alcoholism; that on three separate occasions during the past year, he had been admitted to the hospital suffering from despondency and anxiety associated with alcoholism; that on at least one other occasion, his medical officer treated the applicant in his quarters for the same symptoms; that since his last efficiency report, the applicant, after consulting with the Chief of Neuropsychiatric service, agreed to enter into the group therapy sessions at the hospital and to join Alcoholics Anonymous; that according to the doctor, the applicant half-heartedly accepted the treatment at the hospital and several times, he either failed to be present or was late for scheduled conferences of the group therapy; that subsequent to these failings, the applicant lapsed into an extreme period of anxiety and once again proved his inability to control himself resulting in his third medical evacuation to the hospital; that in spite of these periods of unreliability, the applicant had done extremely well in attaining his religious objectives with the troops; and that he did have a deficiency which marred his otherwise fine record and did tend to negate his fine accomplishments;

e. that on 15 October 1974, the Under Secretary of the Army approved the Board's findings, conclusions and recommendation of 14 August 1974 that the applicant's military records be corrected to show that he was involuntarily released from active duty under the provisions of Title 10 U.S.C. 3785 on 23 January 1962; and

f. that on 13 April 1977, 26 March 1980 and 10 September 1980, respectively, the Board denied the applicant's requests to have his military records corrected

to show that his release from active duty on 23 January 1962 was null and void.

THE BOARD CONCLUDES:

1. That based on the medical evidence of record, and sworn testimony, in behalf of the applicant, by a civilian psychiatrist, the Board is of the opinion that the applicant was not an alcoholic, but abused alcohol for self-medication treatment of an underlying anxiety reaction.

2. That in conjunction with the foregoing, the Board is also of the opinion that, had the applicant been properly diagnosed, in 1960 or 1961, by a qualified psychiatrist, his condition could have been treated and he would have responded to such treatment.

3. That, had the applicant been afforded this treatment, he would have been fully rehabilitated and restored to duty.

4. That, upon restoration to duty, it is reasonable to presume that he would have been promoted to the grade of major and continued to perform his assigned duties in a satisfactory manner until he completed 20 years of active service for retirement purposes.

5. That although a conspiracy against the applicant was not conclusively proved at the hearings, sufficient evidence was adduced to create the appearance of such a conspiracy and that conspiracy ultimately led to the ill-advised, and literally forced and truly unvoluntary resignation of the applicant from the service.

6. That through an unfortunate combination of circumstances, the actions of his religious superiors effectively precluded the

applicant from seeking any meaningful source of recourse.

7. That in view of the foregoing findings and conclusion, the Department's acceptance of the applicant's resignation, without affording him proper treatment and the opportunity to be rehabilitated, has deprived him of promotion to the grade of major and 20-year retirement benefits, and therefore, is unjust.

THE BOARD RECOMMENDS:

1. That all the Department of the Army records of EDWARD D. COWHIG be corrected to show:

a. that his resignation from the service and honorable discharge on 23 January 1962 are void and of no force or effect;

b. that he was promoted to the grade of major, Army of the United States, effective on the date he would have been promoted as recommended by the 1961, Major, Army of the United States, Promotion Selection Board;

c. that he remained on active duty until such time as he completed 20 years active service for retirement purposes; and

d. that, upon completion of 20 years active service and his written application, he was retired for length of service in the grade of major.

2. That so much of the application for correction of military records which is in excess of the foregoing be denied.

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s/ Joseph P. Murphy
JOSEPH P. MURPHY
Chairman

s/ Philip E. Lavigne
PHILIP E. LAVIGNE
Member

s/ Adrian U. Dubuisson
ADRIAN U. DUBUISSON
Member

Appendix J

DISSENT:

A minority, Messrs. Hobbs and Masters, dissent from so much of the foregoing conclusions and recommendation, as pertains to the applicant's promotion. restoration to active duty and retirement, and recommend that his application be denied in its entirety for the following reasons:

a. that in view of the numerous conflicts between previous testimony and that now given concerning the applicant's alcoholism and severe drinking problem, they are of the opinion that, due to passage of time, the current testimony lacks sufficient credibility to support the contention that he was neither an alcoholic nor had a severe drinking problem which affected his duty performance;

b. that the applicant was an alcoholic and had a severe drinking problem at the time of his resignation from the Army; that this was fully supported by the applicant's own sworn testimony before this Board in 1974 wherein he testified, in effect, that, while stationed in Okinawa, he abused alcohol; that it got the best of him and he got dependent on it; and that he was an "alky";

c. that the applicant's abuse of alcohol was affecting his performance of duty and tarnished his image as an officer and Army Chaplain; that this was fully supported by his many hospitalizations for alcoholism and alcohol related problems; that medical summaries describe his treatment for alcoholism, including a statement that on one occasion he failed to go to work for four days because of being incapacitated due to abuse of alcohol; and that his drinking problem was made a matter of record in an officer efficiency report and his sworn testimony, in 1974, that he heard

through the "grapevine" that he was an "awful drunk";

d. that the applicant was not a good candidate for treatment and further rehabilitation efforts for his alcoholism at the time of his discharge; that this was based on the fact that the applicant had been an Alcoholics Anonymous failure and stopped attending Alcoholics Anonymous while stationed in Okinawa; that the applicant testified that he had gone to Alcoholics Anonymous meetings, read their literature, talked to their guys, and alcohol was still a mystery; that nobody forced him to drink; that he drank by himself; that for him to have sought psychiatric care would have, at least subconsciously, been inconsistent with his position, and that this would, in effect, have been an admission on his part that the Army was right and he was wrong;

e. that the applicant did receive proper medical treatment and psychiatric evaluation while on active duty; that this was evidenced by his many hospitalizations for alcoholism and drinking related problems; that he was seen and examined by two qualified psychiatrists who properly diagnosed his alcohol related problems; and that he failed to heed their advice and continued drinking even after being discharged from the Army;

f. that having thoroughly considered the testimony of the civilian psychiatrist specifically employed by the applicant for the limited purpose of testifying before this Board, the minority rejects same for the following reasons; first, the passage of time has significantly changed the testimony of the applicant as is evidenced by the fact that his testimony at his latest hearing is contradicted by the sworn testimony at his former hearing some 10 years ago; that inasmuch as all evidence indicates that Dr. Roark was employed by the applicant and recently interviewed the applicant solely preparatory to his testimony here and not a part of ongoing

analysis or therapy, it is logical to presume that the applicant would relate his current story, which is much more favorable than that related at his hearing in 1974 or at his release in 1962; that being the case, it is logical to presume that his medical opinion is not based on the facts as they existed at the time of his discharge; furthermore, there is no reason to reject the medical evidence of record, the same evidence that the applicant agreed with in 1974, which was created concomitant with the activities and direct observation of the applicant at the time of treatment prior to discharge; it is concluded that this evidence is more probative than that of the testimony of the applicant's psychiatrist which was developed some 20 years after the fact and based on somewhat questionable facts;

g. that they firmly believe that had the applicant not tendered his resignation, he would have been involuntarily separated from the service in a very short period of time due to alcoholism; that this was based on the fact that the applicant would not have sought psychiatric help; that he would have continued to abuse alcohol as evidenced by his numerous episodes of drinking after discharge, civilian hospitalizations, and the loss of a church parish due to his abuse of alcohol; and

h. that notwithstanding the foregoing, the Military Ordinate of the Catholic Church directed the applicant to either tender his resignation or lose his ecclesiastical endorsement; that he could not function as a military chaplain and remain on active duty without this endorsement; and that, accordingly, they are of the opinion that there is no basis on which to correct his records as requested.

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s/ William D. Masters, Jr.
WILLIAM D. MASTERS, JR.
Member

s/ Jack E. Hobbs
JACK E. HOBBS
Member

Appendix J

29 March 1984

MEMORANDUM FOR EXECUTIVE SECRETARY, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

SUBJECT: COWHIG, EDWARD D., 016-14-7279

I have reviewed and considered the report of proceedings, the case summary, military and medical records, and the transcript of the hearing held on 21 and 26 September 1983, concerning Edward D. Cowhig.

You will recall that it was I who directed that a second formal hearing be afforded Father Cowhig so that he could personally appear again and present whatever new evidence he had to offer.

Based upon my review of this second hearing, it is my determination that no error or injustice exists. While the majority of the Board concluded that the applicant was not an alcoholic; that he was not properly diagnosed and treated by a qualified psychiatrist for an underlying anxiety reaction; and that, had he been properly diagnosed and afforded treatment, he would have been fully rehabilitated and restored to duty, I am not persuaded that this was the case. My review of the facts and circumstances surrounding the applicant's case reveals that: (a) by his sworn testimony in 1974, he admits to being an alcoholic and dependent on alcohol while stationed in Okinawa; (b) he was not a good candidate for rehabilitation and restoration to duty; (c) he was properly treated by both qualified medical doctors and psychiatrists, but continued to drink excessively; (d) he made little or no attempt to participate in an alcoholics anonymous program and he could not accept psychiatric care; and (e) he continued to abuse alcohol after his discharge from the service, to a degree

which caused him to lose his church parish and to be hospitalized on many occasions for alcohol abuse.

Contrary to the majority's opinion, I find no conspiracy, on the part of the Army, in the applicant's resignation. The applicant's resignation was tendered as a result of the edict of the military ordinate of the Catholic Church, which stated he either resign from the Army or lose his ecclesiastical endorsement. That edict was based solely on his excessive abuse of alcohol, which was affecting his performance of duty as an Army chaplain and sullying his reputation as a chaplain and as a priest.

In support of my determination, I concur with and adopt the rationale submitted by the minority. A memorandum for The Adjutant General, indicating that the application has been denied, has been signed is attached.

s/ William D. Clark
William D. Clark
Principal Deputy
Assistant Secretary
(Manpower and Reserve Affairs)

Appendix J

29 March 1984

MEMORANDUM FOR THE ADJUTANT GENERAL

SUBJECT: COWHIG, EDWARD D., 016-14-7279

Having considered the findings, conclusions and recommendation of the Army Board for Correction of Military Records, and under the provisions of 10 U.S.C. 1552, it is directed:

That in the case of EDWARD D. COWHIG, his application for correction of military records be, and hereby is, denied.

s/ William D. Clark
William D. Clark
Principal Deputy
Assistant Secretary
(Manpower and Reserve Affairs)

Appendix J

DEPARTMENT OF THE ARMY
OFFICE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

MEMORANDUM

28 Mar 84

MEMORANDUM FOR MR. CLARK

SUBJECT: Cowhig, Edward D., 016-14-7279

PURPOSE: To obtain the signature of the PDASA.

DISCUSSION: The memoranda at the tabs implements your instructions to me regarding Father Cowhig's petition to the ABCMR.

RECOMMENDATION: Please sign the memoranda at the tabs and return to me for dispatch.

s/ Jack
John W. Matthews
Acting Deputy Assistant Secretary
(DA Rev Bd. &
Personnel Security)

Attachments

(Handwritten) Decision Made 29 March 1984 - EDC

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23 May 1986

SFMR
COWHIG, EDWARD D.
016-14-7279

Reverend Edward D. Cowhig
Greenbush, Massachusetts 02040

Dear Reverend Cowhig:

This is in reference to your recent letters to the Secretary of the Army, Principal Deputy Assistant Secretary (Manpower and Reserve Affairs), Congressman Gerry E. Studds and to your letter of 29 April 1986 concerning the review of your application for correction of military records.

Although this is repetitive of information previously furnished to you, I must again state that in the enactment of Section 207 of the Legislative Reorganization Act of 1946, now codefied in 10 U.S.C. 1552, the Congress vested authority for the correction of Army records in the Secretary of the Army, and he may act only through the Board for Correction of Military Records. The provisions of this law are clear, and do not include any authority for review of your case by any other officer or official of the Executive Branch of the Federal Government.

As you know, your case has been reviewed on numerous occasions, to include two formal hearings, in connection with your desire for relief through this Board. You were provided ample opportunity to furnish or present to the Board any evidence you desired for its consideration during the course of these hearings. The information, which you have submitted subsequent to your

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last hearing, has been carefully studied and the content appears to be substantially similar to information previously submitted and considered by the Board. Accordingly, it has been determined that no new relevant information has been presented to warrant reopening of your case. "New and material evidence" is considered to be evidence, which if previously evaluated by the Board, could reasonably be expected to have resulted in a finding other than that rendered as a result of the prior review of your case. Evidence, which is repetitious or based on emotion or which tends to elaborate on facts previously considered by the Board, is not deemed to be new and relevant material evidence.

The Correction Board has a considerable backlog of applications, the majority of which have not received an original review and consideration; as opposed to your case, which has been considered and reconsidered on many occasions. While your concern and desires are recognized, it is unfair and discriminatory to expend time in responding to your repeated requests which are duplicative in nature of what you have asked for previously.

Therefore, I must respectfully inform you that, in response to any future correspondence, you will be furnished a copy of this letter.

You are again reminded, if you desire additional review of the Board's action, of your right to institute action in a Federal Court of competent jurisdiction.

Sincerely,

KARL BIELENBERG
Karl Bielenberg
Executive Secretary

CF: Honorable Gerry E. Studds

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On 11 March 1980 an informal contact by a member of the Board's staff was made with the Chief of Chaplains and a copy of the informal records maintained in that office concerning the applicant's separation was obtained. A copy is attached.

On 11 March 1980, based on a suggestion from the Chief of Chaplains Personnel Officer, a member of the Board's staff contacted the Office of the Chancellor of the Military Ordinariate, New York, N.Y., and was informally advised that provided the Board found it necessary the signature on the letter maintained in their files from LTG Paul W. Carraway could be compared with the signature on the letter submitted by the applicant, also signed by LTG Carraway. In addition, an expression of concern on the part of the responsible parties in that office was discussed since the circumstances surrounding the applicant's separation were considered a church matter; therefore, by necessity, confidentiality had to be maintained. In effect, the responsible individual concerned expressed an opinion that, in his view, the subject letter should not be released outside the church.

(Handwritten) MFR
11 Apr 80
This was not seen by the Board.
(Initial Illegible)

Appendix J

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

SFMR 25 SEP 1980

Honorable Gerry E. Studds
Representative in Congress
1143 Washington Street
Hanover, MA 02339

Dear Mr. Studds:

This is in further reply to your inquiries in behalf of Father Edward D. Cowhig, concerning his application for correction of military records.

Inclosed for your information is a copy of the Board's letter to Father Cowhig which is self-explanatory concerning the Board's most recent action in his case.

The Board's decision to not grant a second hearing in Father Cowhig's case was not based solely on the letter purportedly written by General Carraway and which is now properly in the files of the Military Ordinariate in New York City. The decision was based on substantial, undisputed evidence that he was a practicing alcoholic in 1961, who choose not to abstain from the abuse of alcohol after being hospitalized on several occasions for treatment. His abuse of alcohol resulted in his being relieved of his duties and his being returned from overseas for treatment at the Walter Reed Army Medical Center.

Your interest in this case is appreciated.

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Sincerely,

s/ Raymond J. Williams
Raymond J. Williams
Executive Secretary
Board for Correction
of Military Records

Inclosure
As stated

Appendix J

4450 South Park Avenue
Chevy Chase, Maryland 20015
11 July 1979

Father E. Cowhig
Saint Jude's Rectory
Main Street, Norfolk, MA 02056

Sir:

I am satisfied that I did not prepare a letter concerning you. Further, insofar as I can discover, no letter concerning you was prepared by any member of my staff or by any employee in my headquarters, with or without my consent.

Yours truly,

s/ Paul W. Caraway
Lieutenant General, U.S. Army

APPENDIX K — NUTSHELL CHRONOLOGY — HISTORY

Date	Event-Comment-Citation
8 July 1960	First Hosp. Admission - "No Evid. A or N" - Brief App. Ch. App. 103
2 Feb 1961	Second Hosp. Admission - "No Evid. A or N" - *Id.*, p. 104
9 May 1961	Certificate for "Top Secret" Clearance - Ex. Vol. 3 Ct. App., p. 41
18 Sept. 1961	Third Hosp. Admission - "No Evid. A or N" - Brief App. Ct. App., p. 105
21 Sept. 1961 to 20 Oct. 1961	Biased attitude at Church Hdq., *Id.*, pp. 113-115
4 Oct. 1961	Diagnosis - no supporting data - "Medical Impairment for Duty: None" - *Id.*, p. 105
Unknown but prior to Departure	Prejudgment in Chief of Chaplain's office in re, see also (ABCMR), *Id.*, p. 112, pp. 112A, 112B, 116
6 Oct. 1961	Departure from Okinawa
7 Oct. 1961	Efficiency Reports Made - *Id.*, p. 135
11 Oct. 1861	Reports Reviewed (see Item #19) by Chief of Staff ("My Review indicates in further action"), *Id.*, p. 135

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1 Oct. 1961	Putative letter of Lt. Gen. Paul W. Caraway, *Id.*, pp. 151, 152 (Received for first time by Petitioner 4 August 1980)
31 Oct. 1961	Letter from Church Authorities - Ex. Vol. 3, Ct. App. p. 3, last par. - recognized by government as a demand (see "Remarks" - Brief App. Ct. App. p. 93)
1st week November 1961	Personal Visit to Military Ordinariate, New York "When I say you are out, you are out!" Brief Ct. App. p. 13, last paragraph.
7 Nov. 1961	Resignation under duress - Brief App. Ct. App. 92A Involuntary Resignation (so declared 15 Oct 1974), Ex. Vol. 3, Ct. App., p. 72
7 Nov. 1961	Diagnosis at Walter Reed Hospital (No treatment for anything) - Brief App. Ct. App., pp. 106-109
January 1962	Visit to Bishop Furlong - Military Ordinariate - Brief, Ct. App., p. 15 ("To win is to lose!")
11 Jan. 1962	Letter to Cardinal Spellman (Re: forced resignation) - Brief/Appendix Ct. App. p. 117
23 Jan 1962	Separation

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28 Sept. 1962	Extracts of 3-star General's 1961 letter sent to Cardinal Cushing (Boston) - Ex. Vol. 3, Ct. App., pp. 51-53
6 April 1964	To Speaker McCormack from Maj. Gen. F.C. Weyand ("Proximate Reason was a report to Cardinal Spellman) - Brief/App., Ct. App., pp. 118-119
29 May 1961	Letter of Cardinal Spellman ("I have reviewed the case . . . " - Caraway 1961 letter in his files), Brief/App., Ct. App., p. 120 (on appeal to Card. Cooke, was denied access 13 Nov. 1975, *Id.*, p. 121)
20 Oct. 1966	Ecclesiastical Endorsement granted, *Id.*, p. 122
2 April 1968	"Understanding" - No FBI security Clearance, *Id.*, p. 123
4 April 1968	Cardinal Cushing to me, *Id.*, p. 124 (see Also FBI letter, p. 125)
11 June 1973	(After learning of the existence of ABCMR) - Letter to Adjutant General ("Forced Resignation;" "invalid and illegal"), *Id.*, pp. 126, 127
11 Dec. 1973	Letter to ABCMR ("invalid Resignation;" "Coerced;" "Inspired by false reports"), *Id.*, p. 128

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14 Aug. 1974	ABCMR Hearing and Recommendation, Ex. Vol. 3, Ct. App., pp. 17-23
15 Oct. 1974	Records corrected to show "involuntarily released" under Title 10 U.S.C. #3785, Ex. Vol. 3, Ct. App., p. 72
13 April 1977	ABCMR - Memorandum of Consideration, denied ("Failed to submit sufficient relevant evidence"), Ex. Vol. 3, Ct. App., pp. 24, 25
11 July 1979	Letter from Lt. Gen. (Ret.) P.W. Caraway (denying authorship of 1961 document), Brief/App., Ct. App., p. 132
26 March 1980	ABCMR - Memo of Consideration (failed to submit sufficient relevant evidence), Ex. Vol. 3, Ct. App., pp. 26-28
10 Sept. 1980	ABCMR - Memo of Consideration, Ex. Vol. 3, Ct. App., pp. 28A-34
24 Nov. 1980	Certification (of military record) filed in Court of Claims "as true and exact," Brief App. Ct. App., p. 150
27 Feb. 1981	Order of Ct. Claims, "We need not address . . . or the merits of the cause of action," Ex. Vol. 3, Ct. App., pp. 1-2
3 April 1981	Motion to revoke denied, Ex. Vol. 3, Ct. App., p. 3

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25 June 1981	Complaint filed in District Court, Ex. Vol. 3, Ct. App., p. 6, par. 2
31 March 1982	Memo - Dist. Ct. (''Nature of Mandamus;'' ''Final Judgement of Ct. Cl.;'' (However not on the merits - EDC), Ex. Vol. 3, Ct. App., pp. 4-8
22 Nov. 1982	Opinion and order Court of Appeals, Ex. Vol. 3, Ct. App., pp. 10-15
17 Dec. 1982	Rehearing denied, *Id.*, p. 16
March 1983	Petition for certiorari, Ex. Vol. 3, Ct. App., pp. Beginning to End
18 April 1983	Cert. Denied, Brief App., Ct. App., p. 134
28 April 1983	By phone, Granted formal hearing, Reply Brief, Ct. App., p. 7
Sept. 1983	ABCMR hearing, Transcript, Ex. Vol. 5, Ct. App., Appendix thereto, Vol. 4, Ct. App.
28 March 1984	Report submitted to the Asst. Sec. of Army, Brief App., Ct. App., pp. 1-8
29 March 1984	Decision, Brief/App., Ct. App., pp. 9-11
4 March 1985	Dr. Roark, MD, psychiatrist, Brief/App., Ct. App., p. 16

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30 March 1985	My Commander, Brief/App, Ct. App., pp. 21-24
1 April 1985	R.D. Loring, Esq., *Id.*, pp. 25-30
22 April 1985	John P. Roache, Esq., *Id.*, pp. 31-33
10 July 1985	My Exec. Officer, *Id.*, pp. 34-36
10 Sept. 1985	A.J. DeVico, Esq., *Id.*, pp. 37-41
1985	Irving Hurwitz, PhD, *Id.*, pp. 42-53
24 Oct. 1985	L.J. Clark, MD, *Id.*, pp. 54, 55
21 Nov. 1985	E.D. Kudarauskas, MD, *Id.*, pp. 56-59
23 Jan. 1986	W.A. Rohde, MD, psychiatrist, *Id.*, pp. 17-20
6 Feb. 1986	R.M. Kilfoyle, MD, *Id.*, pp. 14, 15
1 April 1986	Letter to ABCMR, *Id.*, p. 61
29 April 1986	3rd Letter to ABCMR, *Id.*, pp. 63, 64
15 May 1986	Congressman Mavroulas to U.S. Army Cong. Coordinator, *Id.*, p. 68A
23 May 1986	Response from Ex. Sec. ABCMR, *Id.*, pp. 69, 70
1 July 1986	Letter to Sen. Kennedy, *Id.*, pp. 70B, 70C

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23 July 1986	Cong. coordinator to Cong. Mavroulas ("Case closed at the Dept. of the Army"), *Id.*, p. 70A
24 July 1986	Filed in District Court (Title 10 vsc. 3781-3786) - Federal Question
12 Nov. 1986	Oral Hearing, D. Ct., Brief/App., Ct. App., pp. 71-80 "Action depends upon the actions of ABCMR (In so far as this) is not precluded" p. 79, LL 13-23
28 Sept. 1987	Memo & order concerning settlement, *Id.*, pp. 82-85
22 Oct. 1987	Order D. Ct. "Res Judicata" and "not arbitrary, etc . . . . " App. Herein
12 Jan. 1988	Appeals consolidated
11 Oct. 1988	Judgment of Ct. App. - affirmed D. Ct. App. Herein
11 Jan. 1989	Rehearing denied - App. Herein
11 April 1989	Petition for Cert. - All writs to S. Ct.

APPENDIX L — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, Section 1-2

Section 1 — The judicial power of the United States shall be vested in our Supreme Court and . . . .

Section 2 — The judicial power shall extend to all cases in law and equity, arising under this constitution and the laws of the United States . . .

Bill of Rights (Ratified December 15, 1791)

Article I — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Article V — No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix L

C.F.R. - Ch. V (7-1-86 Edition) (Authority - 10 U.S.C. § 1552)

C.F.R. 581.3(c)(5)(iii):

(iii) All requests for further consideration may be initially screened by the staff of the Board to determine whether any evidence or other matter (including, but not limited to, any factual allegations or any arguments why the relief should be granted) has been submitted by the applicant that was not in the record at the time of any prior Board consideration. If such evidence or other matter has been submitted, the request will be forwarded to the Board for a determination in accordance with this paragraph. If no such evidence or other matter has been submitted, the applicant will be informed that his/her request was not considered by the Board because it did not contain any evidence or other matter that was not in the record at the time of any previous Board consideration.

C.F.R. 581.3(d)(5)(i) and (ii):

(5) *Access to records.* (i) The applicant will be assured access to all official records that are necessary to any adequate presentation of his case consistent with regulations governing privileged or classified material. It is the responsiblity of the applicant to procure such evidence not contained in the official records of the Department of the Army as he desires to present in support of his case.

(ii) The Board shall not release classified material to the applicant or to his counsel or personal representative. In such cases the Board shall take steps in accordance with established regulations to obtain a review of the material to determine whether declassification is possible so that the evidence can be released

to the applicant; or if declassification is not possible, prepare or cause to be prepared a summary of the content of such material in sufficient detail, consistent with the interests of national security, to enable the applicant to prepare a response.

C.F.R. 581.3(e)(2):

(2) *Conduct of hearing.* (i) The hearing will be conducted by the Chairman, and will be subject to his rulings so as to insure a full and fair hearing. The Board will not be limited by legal rules of evidence but will maintain reasonable bounds of competency, relevancy, and materiality.

C.F.R. 581.3(f)(1)(d)(iii):

(iii) *Record of proceedings.* When the Board has completed its proceedings, a record thereof will be prepared. Such record will indicate whether or not a quorum was present at the hearing and at the Board's deliberations. The record will include the application for relief, a transcript of any testimony, affidavits, papers, and documents considered by the Board, briefs and written arguments filed in the case, the findings, conclusions and recommendations of the Board, and all other papers, documents, and reports necessary to reflect a true and complete history of the proceedings. The record so prepared will be certified by the Chairman or his designee as being true and complete.

C.F.R. 581.3(f)(2):

(2) *Action by Secretary of Army.* The record of proceedings of the Board, except in cases finalized by the Board under authority delegated in paragraph (f)(1)(v) of this section or those denied the Board without a hearing, will be forwarded to the Secretary

of the Army who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the Board for further consideration when deemed necessary. If the Secretary's decision is to deny relief, such decision shall be in writing and, unless he expressly adopts in whole or in part the findings, conclusions and recommendation of the Board, shall include a brief statement of the grounds for denial. See paragraph (C)(5)(v) of this section.

C.F.R. 581.3(C)(5)(v):

(v) The brief statement of the grounds for denial shall include the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory and/or regulatory violations rejected, together with all essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character of and reasons for a discharge. Attached to the statement shall be any advisory staff opinions considered by the Board not fully set forth in the statement and any minority opinions. Counsel and applicant will be informed that the name and final vote of Board members will be furnished or made available upon request.

C.F.R. 581.3(f)(4)

(4) *Reconsideration.* After final adjudication, further consideration will be granted only upon presentation by the applicant of newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Army.

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32 C.F.R. 510.0:

PART 510—CHAPLAINS

§ 510.1. Private ministrations, sacraments, and ordinances.

Chaplains will conduct or arrange for appropriate burial services at the interment of members of the military service, active and retired, and for members of their families upon request. A chaplain may perform the marriage rite, provided he complies with the civil law of the place where the marriage rite, provided he complies with the civil law of the place where the marriage is to be solemnized and provided all parties concerned have complied with the requirements of the denomination the chaplain represents and with any directives which may have been issued by the military command or higher headquarters. The scope of the chaplains' work will include such ministrations as are held by some denominations or religious bodies as sacraments and by others as rites or ordinances. Chaplains will administer or arrange for rites and sacraments for military personnel and civilians under military jurisdiction according to the respective beliefs and conscientious practices of all concerned.

(R.S. 1125; 10 U.S.C. 238)
[16 FR 12931, Dec. 27, 1951]

32 C.F.R. 65.4(b)(ii):

(ii) Be able to exercise ecclesiastical authority to grant or withdraw ecclesiastical endorsements.

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CODE OF CANON (CHURCH) LAW

Responsibility for Ministry

Canon 986—§ 1. All to whom the care of souls is committed by reason of an office are obliged to provide that the confessions of the faithful entrusted to their care be heard when they reasonably ask to be heard and that the opportunity be given to them to come to individual confession on days and hours set for their convenience.

§ 2. In urgent necessity any confessor is obliged to hear the confessions of the Christian faithful, and in danger of death any priest is so obliged.

Doctrinal Violations/Disobedience

Canon 1371—The following are to be punished with a just penalty:

1° besides the situation mentioned in can. 1364, § 1, a person who teaches a doctrine condemned by the Roman Pontiff or by an ecumenical council or who pertinaciously rejects the doctrine mentioned in can. 752 and who does not make a retraction after having been admonished by the Apostolic See or by the ordinary;

2° a person who wrongly does not otherwise comply with the legitimate precepts or prohibitions of the Apostolic See, the ordinary or the superior and who persists in disobedience, after a warning.

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Opposition to Church Authority

Canon 1373—One who publicly either stirs up hostilities or hatred among subjects against the Apostolic See or against an ordinary on account of some act of ecclesiastical power or ministry or incites subjects to disobey them is to be punished by an interdict or by other just penalties.

Reputation and Privacy

Canon 220—No one is permitted to damage unlawfully the good reputation which another person enjoys nor to violate the right of another person to protect his or her own privacy.

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CHAPTER 359.—SEPARATION FROM REGULAR ARMY FOR FAILURE TO MEET STANDARDS

§ 3785. Rights and procedures

(a) Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be—

(1) notified in writing of the pendency of any proceeding for his removal;

(2) allowed reasonable time to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry and a board of review; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding.

(b) No person may be a member of more than one board convened under this chapter for the same officer.

(Aug. 10, 1956, c. 1041, 70A Stat. 219.)

CHAPTER 60—SEPARATION OF REGULAR OFFICERS FOR SUBSTANDARD PERFORMANCE OF DUTY OR FOR CERTAIN OTHER REASONS

§ 1185. Rights and procedures

(a) Under regulations prescribed by the Secretary of Defense, each officer required under section 1181 of this title to show cause for retention on active duty—

(1) shall be notified in writing, at least 30 days before the hearing of his case by a board of inquiry, of the reasons for which he is being required to show cause for retention on active duty;

(2) shall be allowed a reasonable time, as determined by the board of inquiry, to prepare his showing of cause for his retention on active duty;

(3) shall be allowed to appear in person and to be represented by counsel at proceedings before the board of inquiry; and

(4) shall be allowed full access to, and shall be furnished copies of, records relevant to his case, except that the board of inquiry shall withhold any record that the Secretary concerned determines should be withheld in the interest of national security.

(b) When a record is withheld under subsection (a)(4), the officer whose case is under consideration shall, to the extent that the interest of national security permits, be furnished a summary of the record so withheld.

(Added Pub. L. 96-513, Title I, § 110, Dec. 12, 1980, 94 Stat. 2874.)

CHAPTER 7—JUDICIAL REVIEW

Title 5 U.S.C.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

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An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

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§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisons, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency actions, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretions, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to setions 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review

the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

§ 552(a)(4)(B)

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

§ 552a(d). Access to records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

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Army Regulation 380-5

c. Restrictions. Only the Secretary of Defense, the Secretaries of the Military Departments and those officials specifically designated to act for them in their absence are authorized to prolong the duration of classification beyond 20 years from the date of original classification. Other officials designated to exercise original classification authority, pursuant to this Regulation, are authorized to prolong classification as follows:

1. Except as provided in paragraph 3, below, original Top Secret classification authorities may prolong classification not more than 20 years from the date of original classification.

August 15, 1979

Army Regulation 635-120

Chapter 18

Discharge of Chaplains upon loss of professional qualifications:

* * *

b. An applicant for the chaplaincy must receive endorsement from an ecclesiastical endorsing agency as a requisite to appointment or designation as a chaplain. Upon appointment as a commissioned officer, a chaplain serves as a priest, rabbi, or minister of religion in the Army. The officer retains status as a chaplain based upon the continuance of the religious body's ecclesiastical endorsement. If the ecclesiastical endorsing agency withdraws its endorsement, the officer loses this integral part of his professional qualifications as a chaplain.

September 15, 1981